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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

WALTER P. McFARLAND,

Petitioner,

against

ELIZABETH K. KNAPP, LESTER J. TANNER and ARTHUR S. FRIEDMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL N. GREENSPOON
Counsel for Petitioner
600 Third Avenue
New York, N. Y. 10016
212-867-0606

Of Counsel:

SAMUEL N. GREENSPOON
EATON, VAN WINKLE & GREENSPOON

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To The Honorable Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Petitioner, Walter P. McFarland, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on March 28, 1972.

Opinions Below

The opinion of the Court of Appeals, Second Circuit, appended hereto, is reported at 457 F.2d 881. The opinions of the United States District Court for the Southern District of New York, appended hereto, are not reported as yet.

Jurisdiction

The judgment of the Court of Appeals was entered on March 28, 1972, Appendix A, *infra*. A timely petition for rehearing was denied on April 13, 1972. Appendix A, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Where the District Judge, pursuant to Rule 42(b) Fed. R. Civ. P., deferred for separate trial an issue on which plaintiff Knapp had the burden of proof, and induced petitioner to waive the jury, at the close of plaintiff's case, on the express condition and understanding that such issue should continue to be deferred for separate trial, does a breach by the District Judge of such condition and understanding, induced by plaintiff and her counsel, vitiate the waiver of the jury trial?

2. Where the District Judge, pursuant to Rule 42(b) Fed. R. Civ. P., deferred for separate trial an issue on which plaintiff had the burden of proof, and then decided that issue against petitioner, without notice to petitioner or opportunity to be heard, is the petitioner entitled to a full-scale trial on such issue, without limitation as to his witnesses and evidence, before a Judge who has no preconceived views on such issue?

3. May the District Judge, without notice to petitioner or opportunity to be heard, utilize unsworn "proofs", brought to the District Judge's attention by plaintiff's

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Figures in parentheses (——a) refer to pages in the appendix in the Court below unless otherwise noted; figures in parentheses (Tr.——) refer to pages in the stenographic transcript of the trial minutes.

counsel some six weeks after the entire case was rested, to determine an issue against petitioner?

4. Whether attorneys, representing petitioner and another person, who, without the consent or knowledge of petitioner assisted such other person in litigation between him and petitioner and otherwise acted adversely to petitioner's interests regarding the subject matter of their retainer, may recover legal fees from petitioner and are liable to return any fees paid by petitioner to them?

Constitutional Provisions and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in Appendix B, *infra* (pp. 63a-64a).

Statement

1) This is an action commenced in the United States District Court for the Southern District of New York by plaintiff Knapp, as assignee of Tanner & Friedman, to recover legal fees allegedly owed to them by petitioner. The complaint set forth four alleged claims only two of which (the first and second) are now relevant.

The first claim sought to recover from petitioner, pursuant to an alleged express contract between Tanner & Friedman and petitioner, one-half of a bonus of $155,000 for claimed good results achieved by the reacquisition by petitioner of certain property described as Arlington Towers (66a-69a).

The second alleged claim sought to recover from petitioner under an express contract to pay Tanner & Friedman $30 per hour for partners' time and $15 per hour for associates' time for services rendered subsequent to September 1, 1965 (Arlington Towers was reacquired by petitioner on August 31, 1965), and to recover for alleged unpaid disbursements (69a-71a).

Pursuant to leave of the District Judge, petitioner was permitted to bring in Tanner & Friedman, plaintiff's assignors, as parties to this action and to file a claim against them to recover all fees paid by petitioner to them (3a, 77a-79a). Petitioner alleged that Tanner & Friedman had violated their fiduciary duties to him, were barred from any recovery herein, and should be compelled by reason thereof to repay to petitioner all fees he had previously paid to them (73a-79a).

Petitioner timely filed a demand for a jury trial of all issues in this action (1a, 76a).

The District Court had jurisdiction over this action under 28 U.S.C. 1332—petitioner is a citizen of Virginia and plaintiff and Tanner & Friedman are citizens of New York and the amount in controversy exceeded $10,000 exclusive of interest and costs (66a, 77a). The substantive law of New York is concededly applicable.

2) Petitioner retained Tanner & Friedman to represent him as his attorneys in an action pending in the United States District Court for the Southern District of New York entitled *McFarland* v. *Gregory* (hereafter "Gregory Action") (106a, 111a), which action was assigned to District Judge Dimock. Such retention commenced about January 1964 (106a, 111a). In September, 1964, petitioner and Tanner & Friedman expressly agreed that Tanner and Friedman would be paid at the rate of $30 per hour for partners and $15 per hour for associates and that "when the result is achieved, when we have decided what the benefits are, we'll talk about an additional fee" (112a-113a; cf. Exh. 7, 389a).

3) Tanner & Friedman claim, and the District Judge found, that in August 1965, some 20 months after Tanner & Friedman were retained, petitioner and Tanner & Friedman expressly agreed that the "additional fee", the bonus,

should be $155,000 of which one-half was payable by petitioner (116a-119a, 160a-161a, 27a).

4) However, under the law of the State of New York, since the bonus agreement was made after Tanner & Friedman were retained, plaintiff had "the burden of proving that the arrangement for compensation was fair and reasonable and fully comprehended by the client [petitioner]". *Matter of Schanzer,* 7 App. Div. 2d 275, 278 (1st Dept. 1959) affd. 8 N.Y. 2d 972 (1960). The Court of Appeals so ruled herein (Appendix A, *infra,* p. 11a).

Plaintiff alleged in her complaint that the $155,000 bonus was fair and reasonable to petitioner (cplt. pars. 10 and 11, 68a), and petitioner's answer denied such allegation (73a-74a). The pretrial order accordingly provided as one of the issues for trial "was said agreement [the $155,000 bonus] fair and reasonable and known and understood by the clients?" (131a).

5) Before the jury was empaneled the District Judge ruled that the trial of the $155,000 claim would be bifurcated (83a-83a):

> "I'm going to direct that the issue with reference to the $155,000 bonus claim first be determined by a verdict of the jury before any necessity arises for proof as to whether that was reasonable."

In the District Judge's words (89a) "all reference now on the reasonableness of the 155 is out until the determination of the jury". The District Judge continued to adhere to such ruling of bifurcation throughout the plaintiff's case (e.g. 120a, 121a, 129a, 131a, 132a, 207a). Naturally, petitioner complied with the District Judge's rulings (144a-159a, 188a-204a).

6. Prior to plaintiff resting her case she applied to substitute trial counsel. The District Judge ruled that such

application should await the close of plaintiff's case. After plaintiff rested she moved to substitute Tanner & Friedman as attorneys of record. Petitioner objected to any such *pro se* representation before the jury. Finally the District Judge suggested that perhaps a waiver of the jury might solve the problem (Tr. pp. 816-821, 843, 897-9; 226a-227a). The District Court stated (227a):

> "I would do this on the same basis as before insofar as splitting is concerned".

Tanner & Friedman said that they would waive a jury (227a). Petitioner's counsel asked to confer with petitioner and after such conference the following colloquy occurred (227a):

> [Petitioner's counsel] "Your Honor, may I ask just one question. I assume in view of what your Honor said, [i.e., 'I would do this on the same basis as before insofar as splitting is concerned' (227a)] that if the jury is waived that your Honor would continue to limit the proof and not allow the case to expand?
>
> "The Court: I would limit the proof in the same way I have heretofore and I would at the point which I intended to take as the first set of issues to the jury stop at that point, permit findings, proposed findings, and memoranda, and conclusions of law proposed to come in and I would decide that and then decide whatever else had to be decided as a matter of law.
>
> "If, for example, the 155 is thrown out, I would decide the same thing after arguments and briefs and then I would hear whatever other testimony had to be taken and then proceed the same way.
>
> "Mr. Greenspoon: The defendant agrees to waive the jury."

7. Petitioner would never have waived the jury without such assurances and promises from the District Judge. After the jury was waived, petitioner asked no questions

of petitioner's witnesses addressed to such deferred issue (229a-246a; see, 247a, 248a). Indeed, petitioner changed the proofs he originally intended to offer because of the District Judge's said rulings and assurance (284; see 302a, 303a, 304a, 310a, 311a, 312a, 323a, 324a).

8. One thing is crystal clear. The District Judge breached his assurances and promises pursuant to which he induced petitioner to waive the jury. The decision rendered by the District Judge provided for a judgment to be settled on, *inter alia*, the $155,000 bonus claim in favor of the plaintiff and against petitioner (56a, 57a).

Petitioner's counsel, upon receipt of said decision and before any judgment was entered, wrote to the District Judge (55a-60a) protesting the entry of any judgment as premature—the deferred issue on which plaintiff had the burden of proof had not yet been tried (58a-60a).

Tanner & Friedman urged the District Judge to sign a judgment on the $155,000 claim contending that the District Judge had cautioned all parties at the very end of the trial that such deferred issue had been tried (61a; cf. 335a-336a).

The District Judge ruled that at the very end of the trial he stated to counsel that all aspects of the $155,000 claim had been tried (63a, cf. 335a-336a). Accordingly, the District Judge rejected petitioner's protest and issued a supplemental decision making an express finding that the $155,000 bonus was fair and reasonable and that petitioner so understood it when made on August 5, 1965 (64a).

The District Judge did not say when the deferred issue had been tried (63a-65). Indeed, as late as plaintiff's rebuttal case the District Judge ruled that the deferred issue was still deferred (402a, 303a). Nothing occurred on the rebuttal case with respect to the trial of said deferred issue (302a-337a).

9. The Court of Appeals found that at the commencement of the trial the District Judge bifurcated the $155,000 bonus claim leaving it to the jury to be "asked first to decide whether such an agreement had been made"; and that only after that issue was determined would the deferred issue be tried before the jury (Appendix A *infra*, p. 11a). The Court of Appeals then said (Appendix A, *infra*, p. 11a):

> "During trial the court refused to accept certain evidence proferred on the latter issue, reaffirming that trial with respect to it had been deferred pursuant to Rule 42(b), F.R. Civ. P. The deferment of the reasonableness issue was again confirmed by the court when the parties waived a jury and continued trial before Judge Levet sitting without a jury."

The Court of Appeals said that the District Judge's statement at the end of the case (335a-336a) should not be construed as changing his previous decision deferring the issue of reasonableness for later trial (Appendix A *infra*, p. 12a). Nonetheless the Court of Appeals declined to direct a jury trial on the deferred issue or any issue in the case, remanded the case so that the deferred issue should be tried before the very Judge who already prematurely and improperly decided the issue against petitioner, and ruled plaintiff had made a prima facie case on the deferred issue (Appendix A, *infra*, pp. 13a-14a):

> "In view of the extensive evidence already received that is relevant to the issue, we believe that McFarland should be limited upon the hearing to cross-examination of Tanner and Friedman and to the introduction of such expert witnesses as he may wish to offer. In remanding this aspect of the case for a further hearing and findings, we do not wish to imply that the court's finding of reasonableness was not supported by substantial evidence in the record as it now stands

or that the additional proof (which we, of course, have not seen) will necessarily change the result. We simply believe that McFarland should have the opportunity to offer the foregoing additional proof and to argue that it calls for a contrary decision on the issue. We are confident that the additional evidence will, together with that already introduced, be fairly considered by Judge Levet in making findings on the issue."

In short, the Court of Appeals determined that plaintiff had made a *prima facie* case on an issue that had never been tried, and that petitioner was to be severely limited upon the remand as to what proofs he could offer. In fact, petitioner himself was barred from testifying. That is not the trial of the deferred issue which the District Judge had promised in order to induce petitioner to waive the jury.

The Court of Appeals' statement that the remand gives petitioner the deferred non-jury hearing which he requested at the time when he waived a jury trial (Appendix A, *infra*, p. 14a) is hardly accurate. Whether or not the remand should have required a jury trial, it certainly should have required a full-scale trial before a different Judge without regard to what had occurred on the prior trial in view of the District Judge's rulings as to the deferred issue and the Court of Appeals' determination.

It is true that in denying reargument the Court of Appeals said that after the petitioner had cross-examined Tanner and Friedman and had introduced such expert testimony as he desired, then the District Judge could in his discretion allow other evidence to be adduced (Appendix A, *infra*, p. 18a). Again, that is not a substitute for the full-scale trial on the deferred issue which the District Judge promised the petitioner and on the basis of which the petitioner had agreed to waive a jury trial especially since petitioner on the retrial faced a finding that plain-

tiff had already made a *prima facie* case on the deferred issue.

10. Petitioner contended that Tanner & Friedman had represented adverse interests and thus were debarred from any recovery of legal fees (75a-80a). One of the items asserted by petitioner was that Tanner & Friedman had sought unsuccessfully to withdraw as petitioner's counsel in the Gregory Action while remaining as counsel for Johnson and that in the course of their application Tanner & Friedman tried to induce District Judge Dimock to rule that Johnson had an equal interest with petitioner in the Gregory Action in order to assist Johnson and to affect adversely petitioner's rights (78a-79a).

Tanner & Friedman contended on their motion to withdraw that the complaint in a suit brought by petitioner against Johnson in the Virginia State Courts raised conflicts with testimony given in the Gregory Action and hence they were justified in seeking to withdraw as petitioner's counsel in the Gregory Action (327a-328a).

The District Judge apparently could find no such conflict in the trial record herein. So, on June 1, 1971, six weeks after the entire case was rested on April 8, 1971, the District Judge wrote to Tanner & Friedman asking them to point out the inconsistencies which they claimed existed (Appendix C, *infra*, p. 65a).

In reply to the District Judge's letter, Tanner & Friedman filed an unsworn statement setting forth what they said constituted the inconsistencies which matter was never offered in evidence at the trial or even in the unsworn statement (386-388a). In handing down its decision on an important issue, the bona fides of Tanner & Friedman's motion to withdraw as petitioner's counsel in the Gregory Action (48a), the District Judge utilized and relied on the unsworn, out-of-court "proofs", supplied by Tanner & Friedman six weeks after the trial was ended (48a).

The Court of Appeals excused such misuse of "proofs" saying that petitioner's counsel "did not suggest that it would be improper for the Court to receive or consider the transcript. If such an objection had been made, the Court might have decided not to consider it or to reopen the record *sua sponte* and hold a further hearing" (Appendix A, *infra*, p. 10a). On such flimsy basis the Court of Appeals found a waiver (Appendix A, *infra*, p. 10a).

First, Tanner & Friedman never offered the matter in evidence. They presented it to show record conflicts which justified their actions and there was no reason for petitioner to believe that the District Judge would accept, much less act upon, unsworn out-of-court "proofs".

Second, if the District Judge intended to rely on and use such unsworn, out-of-court matter, it should have informed petitioner so that petitioner could have met such "proofs" in open Court. Until matter is offered in evidence, certainly there is no reason to object thereto on the grounds that the matter is not properly before the Court.

Third, the use of unsworn, out-of-court proofs, is a violation of the Constitutional guarantees of a fair trial as well as of the Federal Rules of Civil Procedure (Rule 43(a)). There is no evidence here of a knowing waiver of those rights.

11. The Courts below have lowered the standards mandated by this Court and other Courts as controlling the conduct of lawyers. The evidence of Tanner & Friedman's misconduct was elicited solely from their testimony and from Court records and hence no issue of credibility is involved.

We have previously pointed out that Tanner & Friedman moved for leave to withdraw as petitioner's counsel in the Gregory Action while remaining as Johnson's counsel. Judge Dimock in the Gregory Action denied their

application (Appendix A, *infra*, p. 10a). We submit that the evidence inescapably shows that the application to withdraw was not bona fide and was designed to advance Johnson's interests in the Virginia Action at the expense of petitioner.

In January 1968 when Tanner & Friedman moved for leave to withdraw as petitioner's counsel in the Gregory Action, petitioner [plaintiff therein], had rested his case and Judge Dimock was considering the Gregory defendants' motion to dismiss for failure to establish a *prima facie* case.*

Prior to the time Tanner & Friedman made such motion, petitioner had commenced the Virginia Action in which petitioner alleged that Johnson's sole rights in Arlington Towers arose from a contract between petitioner and Johnson made in August 1965 (33a, 426a, cf. 491a-492a). This negated any contention that Johnson had any interest in any recovery in the Gregory Action (Exh. C, 475a-476a).

Even before the motion to withdraw was argued, Judge Dimock ruled that only petitioner had any interest in any judgment which might be entered in the Gregory Action (Exh. C, 466a, 467a, 468a). On the argument of the withdrawal motion Judge Dimock ruled over and over again that petitioner had all rights to any judgment in the Gregory Action (Exhs. D, 493a, 496a, 498a-499a, 500a-503a, 508a, 509a-510a, 513a).

So Tanner & Friedman undertook on their motion to withdraw to induce Judge Dimock to rule that Johnson's

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* The Court below makes the mistaken statement that petitioner "has failed to demonstrate how the conduct of Tanner and Friedman could adversely affect their vigorous and successful prosecution of the Gregory suit on behalf of" petitioner and Johnson (Appendix A, *infra*, p. 10a). Judge Dimock dismissed the complaint and the Court of Appeals affirmed such dismissal (425 F. 2d 443). If a complete loss is a "vigorous and successful prosecution", then there can be no unsuccessful prosecution.

interest long antedated August 1965, and that Johnson had always had an equal interest with petitioner in the Gregory Action (476a; 496a-498a, 499a, 500a, 501a, 502a, 503a, 505a-508a, 509a-510a, 511a, 513a-516a).

They pushed Johnson's claimed interest in the Gregory Action to the point that Judge Dimock was moved to remark (513a):

> "You are never going to find a definite ruling by the Court that this claim is now vested in anybody except McFarland."

12. Tanner & Friedman did much more than the foregoing to aid Johnson and to injure petitioner. They aligned themselves in the dispute between petitioner and Johnson on the side of Johnson even though they knew, or are chargeable with knowledge, that Johnson had no interest in the Gregory Action (Exhs. C and D, 449a-523a).

Some time in the spring of 1967 Tanner & Friedman learned that petitioner and Johnson were having disputes about Arlington Towers (196a-197a).

Friedman had known a Washington lawyer by the name of Abram Chayes since 1946 (195a-196a) when they were classmates at law school (197a). Johnson asked Tanner if he knew any law firm in Washington which could represent Johnson in his disputes with petitioner (331a, 332a). In response to this question Tanner told Johnson that he would call Chayes, this former classmate of Friedman (333a). No other lawyer was suggested by Tanner & Friedman (197a).

Tanner then called Chayes, told him about the disputes between petitioner and Johnson and asked Chayes if he were willing to talk to Johnson, and that if there would be anything further he would hear from Johnson (333a). Chayes said he was in a position to represent Johnson and Tanner told this to Johnson (333a). Result: John-

son retained Chayes to represent him in his dispute with petitioner (196a, 197a). Of course neither Tanner nor Friedman told petitioner about their dealings for Johnson with Chayes (330a, 332a).

As could be expected Tanner & Friedman would take steps to assist Friedman's old friend Chayes to help their more affluent client Johnson.

As early as May 1967 they began to supply papers to Johnson's counsel which they had acquired as counsel in the Gregory Action (333a, 334a; Exh. K). The Court's excuse for this misconduct is that Tanner & Friedman represented both Johnson and McFarland in the Gregory Action and that Johnson had every right to those papers (Appendix A, *infra*, p. 9a). Such ruling collaterally overrules Judge Dimock's rulings in the Gregory Action and is improper in law. Judge Dimock flatly said (Exh. C, 468a):

> "It is an application to withdraw on behalf of McFarland which would take Friedman and Tanner out of the claim we have been listening to for almost a year and leave Tanner and Friedman representing Mr. Johnson who has a claim to an apartment."

Tanner & Friedman clearly knew that they were rendering services to Johnson in supplying him those papers and acting adversely to petitioner. Tanner admitted that such services constituted representation of Johnson in his personal capacity (275a-277a); and that Tanner & Friedman billed Johnson separately for such services (276a).

Tanner & Friedman did not tell petitioner about supplying the papers to Johnson's counsel (Tr. pp. 1329-30).

The proof is unequivocal that Tanner & Friedman participated in and helped Chayes draft Johnson's answer to petitioner's complaint in the Virginia Action and

charged and collected in this case from petitioner for such services. Friedman's time sheet for December 14, 1967 states (200a):

> "Conference with Chayes re factual allegations of draft of answer. Calls from McCarthy" [McCarthy was a counsel for Johnson's company (194a-195a)].

And again Friedman's time sheet for December 15, 1967 says (201a): "Call from Chayes re memo agreement allegation".

Friedman professed lack of recall of what that entry meant (202a), but the inference is clear: Friedman and Chayes were discussing how to answer an allegation in petitioner's complaint regarding the memorandum agreement of April 15, 1957 pursuant to which petitioner acquired the rights asserted in the Gregory Action (Exh. 78, 423a).

Petitioner did not instruct Friedman to perform any such "services", although he was charged therefor and Knapp recovered herein one-half of the time charges applicable thereto (201a).

In sum, the Court of Appeals has countenanced judicial conduct which has so far departed from accepted standards as to warrant this Court's exercise of its supervisory powers over the judicial system.

Reasons for Granting the Writ

Questions Nos. 1 and 2

The integrity of the judicial system is here at stake. Whether the District Judge advertently or inadvertently misled the petitioner, it is indisputable that petitioner was misled. In either event the remedy adopted by the Court of Appeals is not consonant with prevailing concepts of judicial fairness.

The Court of Appeals has ruled that plaintiff made a *prima facie* case on an issue never tried, that petitioner should be rigidly circumscribed as to the proofs he may offer on the trial of the deferred issue, and that, despite the District Judge's breach of his promises to petitioner to induce him to waive a jury and his preconceived determination on the deferred issue, nonetheless the deferred issue should be remanded to the same District Judge for trial without a jury.

The Court of Appeals rejected petitioner's contentions that the jury waiver was rendered a nullity by the District Judge's breach of his promise to petitioner, that the deferred issue should be tried before a jury, and that in any event the remand should be to a different Judge.

Even if it be assumed that the District Judge can surmount his preconceived determination, and weigh the scales equally between the contending parties, nontheless it is clear that there is not present "the appearance of justice" which this Court requires.[1]

Moreover, this Court has consistently held that a litigant is entitled to notice of the claim asserted against him and an adequate opportunity to be heard in defense of the claim.[2] It is perfectly evident that petitioner did not have notice of the claim and in fact the District Judge on numerous occasions told petitioner that the claim was not being tried. The holding of the District Judge against the petitioner on the issue not tried, and the holding of the Court of Appeals that the plaintiff made a *prima facie* case on an issue not tried, does not conform to elemental fairness and due process of law.

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[1] *Offut* v. *United States*, 348 U.S. 11, 14 (1954); *In Re Murchison*, 349 U.S. 133, 136 (1955).

[2] *Simon* v. *Craft*, 182 U.S. 427, 437 (1901); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930).

This failure to afford to petitioner a fair opportunity to be heard and fair notice of the issue being tried, and the finding of a *prima facie* case on the issue not tried, is exacerbated by the fact that plaintiff had the burden of proof on the deferred issue.

Petitioner had a constitutional right of notice of claim and opportunity to be heard at a meaningful time and in a meaningful manner. The Court of Appeals could have accorded this right to the petitioner only by setting aside the judgment of the District Judge and remanding the issue for trial anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.[3]

Petitioner's waiver of a jury trial was expressly conditioned on the understanding that the deferred issue should continue to be deferred. The breach of such condition and understanding, induced by plaintiff and her counsel, vitiated the waiver of the jury by petitioner and thus vitiated the entire trial.[4]

The Court of Appeals' ruling that petitioner's waiver was absolute, although conditioned on the understanding that there would be a separate hearing on the deferred issue, and thus the waiver of a jury trial was not nullified, simply ignores realities.

If petitioner had been given any inkling that the District Judge was trying the deferred issue, or that he would render a decision thereon, then petitioner would never have waived the jury. The District Judge misled the petitioner in inducing petitioner to waive the jury, and it is imma-

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[3] *Armstrong* v. *Manzo*, 380 U.S. 546, 552 (1965); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1949); *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1969); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914).

[4] *Crouch* v. *United States*, 8 F. 2d 435 (4 Cir. 1925).

terial whether the District Judge acted advertently or inadvertently. In either event, petitioner was under a misapprehension of fact as to what the District Judge intended and hence waiver of the jury trial is null and void.[5]

The refusal to wipe the slate clean by the Court of Appeals and to restore petitioner to the position he occupied before he was misled by the District Judge does not conform to the standards applicable to jury trials.[6]

Certainly, the promise of the District Judge rises higher than a mere promise of a private contracting party. Yet the breach of an ordinary contract would render the contract null, void and of no effect.[7]

Question No. 3

The District Judge, without any advance notice to petitioner, relied on and utilized unsworn, out-of-Court statements submitted by Tanner & Friedman some six weeks after the case was rested. On June 1, 1971 (Appendix C, p. 65a) the District Judge wrote to Tanner & Friedman asking them to prepare and send to him a statement showing:

> "what inconsistencies by McFarland existed with respect to the New York and Virginia actions which were referred to in an affidavit of Friedman dated January 16, 1968 in the application for withdrawal

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[5] *Jones* v. *Union Auto Indem. Assoc.*, 287 F. 2d 27 (8 Cir. 1961); *Crouch* v. *United States*, 8 F. 2d 435 (3 Cir. 1925); *Edward Petry & Co.* v. *Greater Huntington Radio Corp.*, 245 F. Supp. 963 (D.C. W. Va. 1965).

[6] *City of Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254 (1949); *Connolly* v. *United States*, 149 F. 2d 666, 669 (9 Cir. 1945).

[7] *Kortjohn* v. *Adams*, 248 App. Div. 106 (1st Dept. 1936); *Reade* v. *Miller*, 235 App. Div. 768 (1st Dept. 1932).

State fully, referring to sources or exhibits. Send a copy of your statement to your adversary and file the original with me."

In reply to the District Judge's letter, Tanner & Friedman filed, among other things, what they claimed were pages of testimony of petitioner taken in the Gregory action (386a-388a).

In handing down its decision on the important issue of the bona fides of Tanner & Friedman's motion to withdraw as petitioner's counsel (48a), the District Judge utilized and relied on this alleged statement which was brought to his attention over six weeks after all parties herein had rested their cases. The utilization of such "evidence" is grossly improper, violated due process, and the District Judge could neither accept such "evidence", nor read it, much less use it and rely on it.[8]

The Court of Appeals found waiver because petitioner's counsel did not suggest that it would be improper for the District Judge to receive or utilize the matter (Appendix A, *infra*, p. 10a). That is no basis for a waiver. The matter was never offered in evidence, either at the trial or at the time of filing the statement. Certainly, the petitioner should have been warned by the District Judge that he contemplated utilizing this "evidence", so that the petitioner could have taken appropriate steps. Indeed, for all that Tanner & Friedman's statement showed, the matter was already in evidence.

Had petitioner known the real basis of the District Judge's proposed ruling he certainly would have acted differently. Thus, we have here a ruling based on "evidence" which petitioner has not been allowed to confront or ebut

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[8] *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907), *Carter* v. *Morehouse Parish School Bd.*, 441 F. 2d 380, 382 (5 Cir. 1971); *Kay* v. *Cain*, 154 F. 2d 305 (D.C. Cir. 1946).

and that is a plain denial of due process and there can be and was no waiver.*

Moreover, Rule 43(a) Fed. R. Civ. P., expressly provides:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules."

There is nothing in the Rules which authorizes the acceptance of evidence as was done here. The trial was closed. The case was not reopened nor a motion made to reopen the case to receive the evidence. The Courts below have improperly permitted "proofs" to be used that are not part of the case.

Question No. 4

It was Tanner & Friedman's responsibility and duty to petitioner to stand aloof from any disputes between petitioner and Johnson and to do nothing to assist the one against the other. When Tanner & Friedman sought to induce Judge Dimock to reverse his ruling that only petitioner had an interest in the Gregory Action, Tanner & Friedman were acting against the best interest of McFarland and in support of Johnson's interests.

Judge Dimock's ruling favored the position asserted by petitioner in the Virginia Action while Tanner & Friedman's argument to induce Judge Dimock to change his ruling supported the position of Johnson in the Virginia Action. Thus, Tanner & Friedman intertwined themselves in the disputes between petitioner and Johnson and placed themselves in a situation wherein they sought to advance the interests of one client at the expense of another.

The Court of Appeals has permitted these fiduciary attorneys to escape the rigor of undivided and unselfish

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* *Carter* v. *Morehouse Parish School Bd.*, 441 F. 2d 380, 382 (5 Cir. 1971).

loyalty to petitioner which is relentless and supreme. The judgment dismissing the defense of adverse interest is thus improper and Tanner & Friedman are foreclosed from any recovery in the premises.[10]

Even before Tanner & Friedman sought to induce Judge Dimock to rule that Johnson had an interest in the Gregory Action, they had aided Johnson in the defense of the action brought by petitioner in the Virginia courts. They assisted Johnson in obtaining a lawyer, in preparing his pleadings, and in marshalling evidence. All of this was done without the knowledge or consent of petitioner.

We submit that these activities constituted that divergence from rectitude which this Court has made clear it will not countenance.[11]

The conduct of Tanner & Friedman related to their prosecution of an action in the United States District Court and they certainly can be called to account for their conduct in handling matters before the United States Courts.

This Court should exercise its supervisory powers over the lower federal Courts and attorneys practicing therein, by ruling that Tanner & Friedman violated that standard of rectitude which this Court has mandated applies to attorneys. If the conduct herein of Tanner & Friedman is permissible then the morals of the market place are the standard for lawyers; not honesty alone, but the punctilio of an honor the most sensitive, must be the standard of

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[10] *Woods* v. *City National Bank & T. Co.*, 312 U.S. 262 (1940); *Baker* v. *Humphrey*, 101 U.S. 494 (1879); *Chi. & West. Towns Buys.* v. *Friedman*, 230 F. 2d 364 (7 Cir. 1956) cert. den. 351 U.S. 943 (1956); *In re Westmoreland*, 270 F. Supp. 408 (D.C. Ga. 1967); *In re W. T. Byrns Inc.*, 260 F. Supp. 442 (D.C. Va. 1966).

[11] *Baker* v. *Humphrey*, 101 U.S. 494, 505 (1879).

behavior.[12] Until now that standard has been applied to lawyers. We urge this Court to reassert that standard here.

Conclusion

In sum, we have here a case failing to vindicate constitutional promises and introducing far-reaching innovations in the law relating to civil trials. The decision of the Court below is in conflict with decisions of this Court and of other Courts of Appeal on the same matters.

The Court below has decided important constitutional questions and questions of federal law in such a way as to unsettle and inject uncertainty into what constitutes a fair trial in a civil action. Promises made by the District Judge in order to induce petitioner to waive a jury have not been enforced. To the contrary, the petitioner has been seriously injured by a finding that a *prima facie* case was made against him on an issue never tried and also by the failure of the Courts below to permit the petitioner to have a full-scale trial as due process mandates.

The Courts below have sanctioned the use of unsworn out-of-court proofs and have permitted a major finding against petitioner on the basis of matter never offered in evidence and which was first brought to the District Judge's attention some six weeks after the entire case was rested.

The standard of conduct which has long been thought to control the conduct of attorneys has been lowered to the conduct of the market place. The punctilio of an honor the most sensitive to which lawyers must conform has been here breached.

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[12] *Meinhard* v. *Salmon*, 248 N.Y. 458, 464 (1928).

In short, the Courts below have sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

Dated: New York, N. Y., June , 1972.

Respectfully submitted,

SAMUEL N. GREENSPOON
Counsel for Petitioner
600 Third Avenue
New York, N.Y. 10017
212-867-0606

Of Counsel

SAMUEL N. GREENSPOON, Esq.
EATON, VAN WINKLE & GREENSPOON

APPENDIX A

Opinions of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 523, 525 September Term 1971

Argued: February 28, 1972 Decided: March 28, 1972

Docket Nos. 71-1982, 71-1993

ELIZABETH K. KNAPP,

Plaintiff-Appellee-Appellant,

against

WALTER P. MCFARLAND,

Defendant-Appellant-Appellee.

WALTER P. MCFARLAND,

Plaintiff-Appellant,

against

LESTER J. TANNER and ARTHUR S. FRIEDMAN,

Defendants-Appellees.

Before KAUFMAN, MANSFIELD and OAKES, *Circuit Judges.*

Appeal from a judgment of the United States District

Court for the Southern District of New York, Richard H. Levet, *Judge*, granting judgment to plaintiff-appellee-appellant, as assignee, for attorneys' fees and dismissing counterclaims. Affirmed in part, reversed in part, and remanded for further proceedings.

SAMUEL N. GREENSPOON, Esq., New York, N.Y. (Eaton, Van Winkle & Greenspoon, New York, N.Y., on the brief), *for Walter P. McFarland, Defendant-Appellant-Appellee and Plaintiff-Appellant.*

ARTHUR S. FRIEDMAN, Esq., New York, N.Y. (Tanner & Friedman, New York, N.Y., on the brief), *for Elizabeth K. Knapp, Plaintiff-Appellee-Appellant and Pro Se.*

MANSFIELD, *Circuit Judge:*

This action by an assignee (Elizabeth K. Knapp) for recovery of legal fees for services rendered by Lester J. Tanner, Esq. ("Tanner") and Arthur S. Friedman, Esq. ("Friedman") to Walter P. McFarland ("McFarland") was tried before Judge Levet, sitting without a jury. The court awarded $154,999.54 together with costs and disbursements to plaintiff and dismissed McFarland's third-party claims against Tanner and Friedman seeking repayment of certain fees because of alleged breach of their fiduciary duty to McFarland, their client. Both sides appealed, plaintiff from dismissal of a claim in the sum of $775 for prosecution of criminal contempt proceeding against Aaron R. Fodiman. We affirm except to the extent indicated below. One issue, the fairness and reasonableness of a contract to pay a bonus of $155,000, is remanded for a further hearing and finding.

The essential background facts are set forth accurately and in detail in Judge Levet's opinion. For present purposes we need only review the highlights. In 1964 McFarland and a business associate, Edward P. Johnson, retained Tanner & Friedman to represent them as attorneys in the enforcement of claims against persons known as the "Gregory group" arising out of agreements with respect to four large high-rise residential apartment buildings in Arlington, Virginia, known as "Arlington Towers." Under the agreements McFarland, Johnson and one John Loughran, who had been the sponsors of the apartment house project, ownership of which had passed to the Gregory group, were granted the right to reacquire one or more of the buildings for a limited period and at certain formula prices, together with certain other rights, including the right to participate in profits from the issuance and sale of stock and debentures by the project and in the proceeds from development or sale of a certain parcel of land. In 1957 McFarland and his two associates brought suit against the Gregory group in the United States District Court for the Southern District of New York claiming breach of these agreements, which resulted in a decree in favor of McFarland granting specific performance. Efforts by McFarland and his associates to reacquire the buildings in accordance with the court's decree, however, were frustrated by the Gregory group, leading to more proceedings before Judge Dimock of the district court and to the retainer of Tanner & Friedman by McFarland and Johnson to enforce their rights against the Gregory group, including the right to reacquire the buildings at the formula price.

The retainer agreement, conceded by McFarland to be fair and reasonable, was set forth in a letter from Tanner to McFarland dated September 29, 1964 as follows:

"This will confirm our understanding that the services which we render in connection with the Arlington

Towers matters are to be billed periodically at our minimal time charges, which are $30 per billable hour for time which Arthur and I devote to the matter, and $15 per hour for associates' time. We will bill you on this basis, and the enclosed statement brings this arrangement up to September 1, 1964. We will, during the year, give you as well a statement for out-of-pocket disbursements expended by us.

"It is also our understanding that if we are successful in achieving a good result for you and Ed Johnson, either by way of litigation or settlement of this dispute, that there will be an upward adjustment of fees, based upon achievement."

As the result of further conduct of the litigation by Tanner & Friedman, in which protracted settlement discussions were held, followed by a new application on August 2, 1965 to Judge Dimock to compel performance, the Gregory group were finally forced to convey the buildings to McFarland and Johnson on August 30 and 31, 1965, at the formula price of $19.9 million. On August 4, 1965, while these litigation and settlement steps were in progress, McFarland and Tanner orally agreed that in the event that Tanner and Friedman were successful in forcing the Gregory group to part with the buildings, McFarland and Johnson would pay them an additional bonus of $155,000 over and above the charges based on time spent (at $30 per hour for partners and $15 per hour for associates).

The agreement to fix the bonus at $155,000 is supported by correspondence between Tanner and McFarland in August, 1965, later oral and written confirmations of McFarland and Johnson, and testimony of Tanner and Friedman. Although McFarland grumbled about failure to achieve a settlement at the figure of $18,425,000, he was

well aware at the time when he assented to the $155,000 bonus that the settlement called for payment of the formula price of $19.9 million, a price which he considered favorable since, according to his own estimate, he was obtaining buildings having a market value of $25 million. Furthermore, in seeking to defer payment of the fees due Tanner & Friedman, including the bonus, he did not deny the existence of the agreement to pay the $155,000 bonus.

Following the reacquisition of the buildings Tanner & Friedman, during the period from September, 1965 through June, 1968, continued to render legal services to McFarland and Johnson pursuant to their September, 1964, retainer agreement. The suit against the Gregory group for conveyance of securities and for compensation allegedly due McFarland was prosecuted by them, leading to a protracted trial before Judge Dimock, which resulted in receipt of $1 million in settlement of certain claims, and two judgments awarding their clients $345,000 and $700,088, the latter of which was reversed upon appeal. (See 363 F.2d 857 (2d Cir. 1966) and 373 F.2d 393 (2d Cir. 1967)). For these services Tanner & Friedman billed McFarland and Johnson $276,028, plus $27,992 for disbursements. Johnson paid his share, plus 50% of the $155,000 bonus. After deducting certain payments received from McFarland, Tanner & Friedman claimed a balance due from him of $37,614.31 plus 12½% of any additional recoveries in excess of $357,187 in pending litigation.

In June, 1969, Knapp, as assignee, filed a complaint against McFarland seeking (first claim) recovery of $77,500, which represented 50% of the bonus and (second claim) $37,614 plus 12½% of certain excess recoveries, pursuant to the agreements of September, 1964 and August, 1965. In addition the complaint (third and fourth claims) sought, in the alternative, recoveries on a *quantum meruit* theory. McFarland's answer admitted the making

and fairness of the September, 1964, retainer agreement but alleged that the August, 1965, agreement to pay the $155,000 bonus was conditioned on his reacquisition of Arlington Towers for $18,425,000. In addition he interposed a counterclaim against Tanner & Friedman for $122,435, charging breach of fiduciary duty, falsification of time charges, and rendition of unnecessary and unauthorized services. During the period from March 30, 1971 to April 8, 1971, the case was tried before Judge Levet, who sat with a jury until all parties waived a jury on April 6, 1971, the trial thereafter proceeding without one. On July 1, 1971, Judge Levet filed his opinion, with detailed findings of fact and conclusions of law, upholding plaintiff's claims, except for the *quantum meruit* claims and for the sum of $775 claimed for services rendered in prosecuting a charge of criminal contempt at the direction of Judge Dimock against Aaron R. Fodiman, one of the Gregory group's counsel.

Judge Levet further concluded that McFarland had failed to prove his affirmative defense and his cross-claim against Tanner & Friedman, which was dismissed. McFarland's counsel, a few days after the filing of the decision, advised the court by letter that its entry of judgment for one-half of the $155,000 bonus was premature for the reason that it had failed to afford McFarland an opportunity to offer evidence with respect to the fairness and reasonableness of the $155,000 bonus, which was to be the subject of a deferred hearing. Thereupon Judge Levet, in a supplemental opinion dated July 9, 1971, stated his understanding that at the conclusion of trial the issue was to be decided on the evidence received without further hearing and made an additional finding to the effect that the $155,000 bonus agreement was fair and reasonable, stating the facts forming the basis of his finding.

Based on our review of the record we find, with the modifications hereinafter noted, that Judge Levet's detailed findings, which reflect his usual painstaking analysis and appraisal of the evidence, are fully supported by substantial evidence. It is equally clear that the record before the district court called for rejection of McFarland's defense and counterclaim based on alleged action by Tanner and Friedman adverse to their clients' interest or in breach of their fiduciary duty.

Turning first to McFarland's charges that Tanner and Friedman breached their fiduciary duty to him, we note certain aspects of the claim were abandoned (e.g., that Tanner and Friedman had testified on behalf of Johnson in a suit between him and McFarland) or were unsupported by proof (e.g., that Tanner and Friedman had falsified charges or charged McFarland for unnecessary or duplicative work). The principal remaining claims of adverse interest are based on the fact that when McFarland brought an action in Virginia against Johnson in November, 1967, claiming that Johnson had no substantial interest in Arlington Towers or in the proceeds of the pending New York action against the Gregory group, Tanner and Friedman assisted Johnson in obtaining counsel to represent him in the Virginia suit, supplied him with copies of papers received by them in their capacity as counsel in the New York action against the Gregory group and, despite contrary holdings by Judge Dimock, took the position that Johnson was an equal owner with McFarland of the claims in the New York action against the Gregory group. The evidence revealed that in the spring of 1967, at a time when the suit against the Gregory group was being tried before Judge Dimock by Tanner and Friedman on behalf of McFarland and Johnson, disputes arose between the latter with respect to Arlington Towers. When Johnson sought to consult Tanner and

Friedman about these differences they, rather than become involved in the dispute, referred him to a reputable Washington, D.C. lawyer who had not had any connection with the McFarland-Johnson or Gregory groups. In November, 1967, McFarland, the plaintiff in the suit against the Gregory group in New York, without the knowledge of Tanner and Friedman, commenced the Virginia action against Johnson, claiming that except for a personal apartment Johnson had no interest in the Arlington Towers claims which were the subject of their New York suit against the Gregory group and seeking rescission of an August, 1965, agreement purportedly conveying a half-interest in Arlington Towers to Johnson. Upon learning of the lawsuit, Tanner and Friedman believed in good faith that, since the allegations as to ownership interest were inconsistent with testimony in the New York suit against the Gregory group to the effect that Johnson owned an interest in the Arlington Towers rights, the claims made on behalf of McFarland and Johnson in the New York suit might be jeopardized. Accordingly they sought a joint meeting with their clients to discuss the possible repercussions of the Virginia suit and offered to review any further pleadings in that suit with a view to protecting their clients' interest in the New York action, an offer that was taken up by Johnson and his counsel but not by McFarland. In addition they supplied to counsel for both parties in the Virginia suit copies of certain documents from the New York action, the papers furnished to Johnson consisting of matters of public record and documents by which McFarland and Johnson had purportedly acquired rights in Arlington Towers on August 31, 1965.

In the meantime the Gregory group moved to reopen the New York suit before Judge Dimock in order to put into evidence McFarland's Virginia complaint, contend-

ng that it was inconsistent with testimony given by McFarland and Johnson in the New York suit. At a meeting held on January 4, 1968, with their clients and Virginia counsel, Tanner and Friedman were given conflicting instructions with respect to the grounds upon which the motion to reopen should be opposed. Thereupon they moved before Judge Dimock to withdraw as counsel on the grounds of conflict in interest between their clients and receipt of conflicting instructions. Judge Dimock denied the motion, ruling that "the issue of any interest of Johnson in the claim here was not before the Court, was not to be determined," that the suit had properly been prosecuted by McFarland as a party to the contract with the Gregory group, and that no conflict of interest in the prosecution of the suit against the Gregory group existed merely because of a dispute between McFarland and Johnson as to the ownership of the claim.

We agree with Judge Levet's conclusion that Tanner and Friedman did not place themselves in the position of representing interests adverse to their representation of McFarland in his suit against the Gregory group. Their reference of Johnson to a reputable attorney whom he could consult regarding his differences with McFarland and their furnishing to Johnson of documents from the files of the Gregory suit did not conflict with their duty to McFarland, who apparently overlooks the fact that they owed a duty to Johnson as a joint client. See generally, 8 Wigmore, Evidence § 2312 at 603-04 (McNaughton Rev. 1961); *Car and General Life Insurance Corp.* v. *Goldstein*, 179 F. Supp. 888, 891 (S.D.N.Y. 1959), *aff'd. per curiam*, 277 F.2d 162 (2d Cir. 1960). When McFarland made statements in his Virginia lawsuit that were seemingly inconsistent with his position in the New York action, it was not unreasonable for Tanner and Friedman to offer to review any further pleadings or statements

made in the Virginia suit, or to confer with their clients regarding the possible impact of inconsistent statements or, when they received conflicting instructions, to move for withdrawal as counsel. The fact that Judge Dimock denied their motion after being advised that Johnson's interest in the New York suit was minimal did not change the joint representation of McFarland and Johnson or imply that Tanner and Friedman had been guilty of any conflict of interest. McFarland has failed to demonstrate how the conduct of Tanner and Friedman could adversely affect their vigorous and successful prosecution of the Gregory suit on behalf of McFarland and Johnson, who were their joint clients at all relevant times.

Equally frivolous is McFarland's claim that Judge Levet committed reversible error in considering a portion of the transcript of McFarland's testimony in the Gregory suit, which was furnished by Friedman in response to a request made by the court on June 1, 1971, after both sides had rested. A copy of the statement was simultaneously furnished by Friedman to McFarland's counsel, who replied in a lengthy letter to Judge Levet dated June 8, 1971, which did not suggest that it would be improper for the court to receive or consider the transcript. If such an objection had been made, the court might have decided either not to consider it or to reopen the record *sua sponte* and hold a further hearing. McFarland's counsel, however, sought instead to persuade the court that the evidence was not relevant because the portion of McFarland's testimony in the Gregory suit furnished to the court referred to a point in time prior to Johnson's transfer of his interest to McFarland and because in any event it had been implicitly rejected by Judge Dimock's later opinion and decree. Regardless of the lack of merit in these arguments, it is readily apparent that McFarland waived the objection now advanced by him.

McFarland does raise two serious questions. The first is that he was denied the opportunity to offer evidence at a deferred session to be held with respect to the fairness and conscionability of the $155,000 bonus fee because Judge Levet decided the issue prematurely. Under New York law plaintiff had the burden of proving not only that McFarland agreed to pay a bonus of $155,000 but that the amount was fair and reasonable and not the product of overreaching on the part of counsel. *Matter of Howell*, 215 N.Y. 466, 472 (1915); *Matter of Schanzer*, 7 App. Div. 2d 275, 182 N.Y.S.2d 475 (1st Dept. 1959), *aff'd. mem.*, 8 N.Y.2d 972, 204 N.Y.S.2d 349 (1960). At the outset the court directed that trial of the issues with respect to the alleged $155,000 bonus agreement would be bifurcated, the jury being asked first to decide whether such an agreement had been made; if so, proof as to the reasonableness of the amount would then be taken at a deferred session and the issue of fairness and reasonableness would be submitted to the jury for determination. During trial the court refused to accept certain evidence proferred on the latter issue, reaffirming that trial with respect to it had been deferred pursuant to Rule 42(b), F.R.Civ.P. The deferment of the reasonableness issue was again confirmed by the court when the parties waived a jury and continued trial before Judge Levet sitting without a jury.

Notwithstanding the deferment of the reasonableness issue the parties did introduce a great deal of evidence with respect to the making of the $155,000 bonus agreement that would be relevant to reasonableness, including the circumstances and objective of McFarland's retainer agreement with Tanner and Friedman, i.e., the obstacles encountered by them, the time and effort expended in the prosecution of the Gregory suit, conversations among parties and counsel as to the bonus, the market value of buildings recovered, the economic benefit realized by McFarland as a

result of counsel's efforts, McFarland's background as an investor and real estate developer, and his experience in dealing with other attorneys.

When Judge Levet filed his July 1, 1971 decision to the effect that Tanner and Friedman were entitled to recover the agreed-upon $155,000 bonus McFarland objected to the entry of judgment on the ground that he had been denied the opportunity to offer proof as to reasonableness. Judge Levet thereupon filed a supplementary opinion pointing out that at the conclusion of the trial he had advised counsel that "this [trial] relates to *all* matters as to whether or not the $155,000 specific fee is sustained" and finding on the basis of the evidence already introduced that the bonus contract was "a fair and reasonable compensation agreement." McFarland argues that in view of its earlier rulings the court's statement should not be construed as changing its previous decision deferring the issue of reasonableness for later hearing. We agree.

Although the court had the power to revoke its earlier direction to the effect that the trial would be split, we believe that where (as here) the court had clearly and repeatedly deferred trial of the reasonableness issue, it could effectively change its decision only by an equally clear statement, coupled with a fair opportunity to offer additional proof with respect to the deferred issue. Although Judge Levet may have intended his closing statement to have this effect, we do not believe that it was sufficiently unambiguous to meet the standard of due process that in our view should apply. See, e.g., *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965). Furthermore, the record reveals that immediately after making the above-quoted statement Judge Levet went on to say "Reserved, however, are any phases of the case which are not determined."

Plaintiff, relying principally on the Supreme Court's decision in *Partmar Corporation* v. *Paramount Pictures*,

347 U.S. 89 (1954), urges that, even assuming that the reasonableness issue continued to be deferred, all circumstances regarding the issue were introduced in connection with trial of the question of the *existence* of the $155,000 agreement and that the court had the power to decide that no genuine issue of fact remained. We disagree. Although most of the essential proof as to conscionability may well have been received by the court in connection with other issues and McFarland not only cross-examined others but also testified personally with respect to circumstances bearing on reasonableness, he was not given the opportunity to introduce expert witnesses, and he may not have fully cross-examined Tanner and Friedman as to the issue. The situation here is unlike that in *Partmar*, where the defendant was given ample opportunity on the trial of plaintiff's case to present evidence with respect to the identical issue raised by his counterclaim, on which trial had been deferred, and the court further concluded that the only evidence not offered, the *Paramount* case decree, would not have changed the result.

Accordingly, we conclude that the court's supplemental finding as to the reasonableness of the $155,000 bonus agreement should be set aside and the case remanded for a further hearing on that issue. In view of the extensive evidence already received that is relevant to the issue, we believe that McFarland should be limited upon the hearing to cross-examination of Tanner and Friedman and to the introduction of such expert witnesses as he may wish to offer. In remanding this aspect of the case for a further hearing and findings, we do not wish to imply that the court's finding of reasonableness was not supported by substantial evidence in the record as it now stands or that the additional proof (which we, of course, have not seen) will necessarily change the result. We simply believe that McFarland should have the opportunity to offer the fore-

going additional proof and to argue that it calls for a contrary decision on the issue. We are confident that the additional evidence will, together with that already introduced, be fairly considered by Judge Levet in making findings on the issue.

We reject as meritless McFarland's argument that the denial of an opportunity to offer further evidence as to reasonableness had the effect of nullifying his waiver of a jury trial. The record is clear that while McFarland waived a jury on the understanding that there would be a deferred hearing as to the reasonableness issue, the waiver was absolute. The deferred hearing was not to be before a jury, but before Judge Levet sitting without a jury. Thus our remand gives McFarland the deferred non-jury hearing which he requested at the time when he waived a jury trial.

We turn next to the district court's decision that Tanner and Friedman were entitled to recover for work done in prosecuting their motion to withdraw as counsel for McFarland in the Gregory suit because of possible conflict of interest between their two clients. We do not question the reasonableness of counsel's apprehension that, because of inconsistent statements by their clients in the two lawsuits and the issuance of differing instructions as to the grounds upon which Gregory's motion to reopen should be opposed, their recovery in the Gregory suit might be jeopardized. However, for the reasons stated by Judge Dimock in denying counsel's motion, their clients' conduct, while rendering their handling of the Gregory suit difficult, was not sufficiently egregious to prevent counsel from continuing to serve their clients' interests in the litigation effectively. In short, they were not hampered in prosecuting the action. Their application to withdraw was denied, Judge Dimock pointing out

that the differences between McFarland and Johnson were not before him except to the extent that inconsistent statements as to Johnson's interest might be offered as to credibility, and that the differences were not sufficient to prevent counsel from prosecuting the suit. Neither side has furnished us with any relevant authority bearing directly on the question of whether an attorney who unsuccessfully seeks permission to withdraw may bill his client for services performed in the effort. But application of basic principles seems to us to call for denial of such an allowance, particularly where, as here, McFarland opposed the application and gained no benefit from it. Accordingly we reverse that part of the district court's judgment awarding $3,125 for such services.

We find no merit in the other arguments advanced by McFarland upon his appeal. Finally, we turn to plaintiff's cross-appeal from the district court's denial of her claim for $775 for services rendered by Friedman as "special prosecutor" by appointment of the court in connection with the Fodiman criminal contempt proceeding. It is settled that:

> "[A] proceeding for criminal contempt, unlike that for civil contempt, is between the public and the defendant, is an independent proceeding at law, and no part of the original cause. . . ." *Michaelson* v. *United States*, 266 U.S. 42, 64 (1924).

Thus, in prosecuting the criminal contempt against Fodiman, Friedman acted as an officer of the court and for its benefit. We conclude that at least in the absence of an agreement by McFarland or any benefit to him as a result of the criminal contempt prosecution,[1] he cannot be called upon to pay for Friedman's efforts in that regard. See

generally *Matter of Loomis*, 273 N.Y. 76 (1937); *Matter of Linder's Estate*, 17 App. Div. 2d 949, 234 N.Y.S.2d 53 (2d Dept. 1962).

The case is remanded for further proceedings consistent herewith. The district court may in its discretion direct immediate entry of final judgment as to all claims disposed of by our decision. No costs are allowed to any of the parties.

FOOTNOTE

[1] Such a benefit might well arise if the court, in its discretion, ordered payment to McFarland of part of a fine assessed in the event of conviction, as it has the right to do in such cases. See, e.g., *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924).

Opinions of the United States Court of Appeals.

71-1982 & 71-1993

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Elizabeth K. Knapp,

Plaintiff-Appellant,

Lester J. Tanner and Arthur S. Friedman,

Plaintiffs,

v.

Walter P. McFarland,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for Elizabeth K. Knapp,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is granted to the extent that the figure "$3,125" appearing on slip sheet opinion page 2457, line 10, is changed to "$1,562.50."

IRVING R. KAUFMAN

WALTER R. MANSFIELD

JAMES L. OAKES

Dated: April 10, 1972

Opinions of the United States Court of Appeals.

71-1982 & 71-1993

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Elizabeth K. Knapp,

Plaintiff-Appellant,

Lester J. Tanner and Arthur S. Friedman,

Plaintiffs,

v.

Walter P. McFarland,

Defendant-Appellant

A petition for a rehearing having been filed herein by counsel for Walter P. McFarland,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Our decision does not preclude the trial judge, after receiving additional evidence authorized by us (slip sheet p. 2455), from deciding in his discretion that further proof would be helpful on the issue of the reasonableness of the $155,000 bonus agreement.

Irving R. Kaufman, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

James L. Oakes, U.S.C.J.

Dated: April 13, 1972.

APPENDIX A

Opinions of the United States District Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ELIZABETH K. KNAPP,

Plaintiff,

against

WALTER P. MCFARLAND,

Defendant.

WALTER P. MCFARLAND,

Plaintiff,

against

LESTER J. TANNER and ARTHUR S. FRIEDMAN,

Defendants.

69 Civil 2590

Appearances:

Tanner and Friedman, Attorneys for Elizabeth K. Knapp and *Pro Se*, Arthur S. Friedman, Of Counsel.

Eaton, VanWinkle and Greenspoon, Attorneys for Walter P. McFarland, Samuel N. Greenspoon, Of Counsel.

LEVET, D. J.:

As indicated by the amended title above set forth, two actions are involved in this matter, to wit, (1) an action by Elizabeth K. Knapp, as assignee of Tanner and Friedman, for the collection of legal fees, as more particularly hereinafter set forth; (2) an action by McFarland against

Tanner and Friedman for repayment of monies heretofore paid on account of legal services upon the ground of certain alleged breaches of fiduciary obligations by said attorneys. Since this action contemplated the return of monies from Tanner and Friedman, the assignors, it became necessary to permit the institution of the second action and its joinder with the original action for trial.

I.

Knapp v. McFarland

Plaintiff, Elizabeth K. Knapp (hereinafter "Knapp") has instituted an action as the assignee of Lester J. Tanner and Arthur S. Friedman (hereinafter jointly referred to as "Tanner and Friedman"), attorneys at law, to recover moneys allegedly due them for legal services rendered on behalf of, and disbursements incurred for, the benefit of defendant Walter P. McFarland (hereinafter "McFarland") in connection with and following from the enforcement of various claims and rights under certain existing judgments and decrees of this court in an action therein entitled, "Walter P. McFarland, Edward P. Johnson and John Loughran, plaintiffs, against George S. Gregory, Alexander Westreich, N. V. Handelmaatschappin Antilia, Sol Drescher and Louis Rosenberg, defendants," Civil No. 124-259 (hereinafter referred to as the "Gregory action" or "the suit").

Knapp's complaint set forth four alleged causes of action which are briefly described as follows:

1. First Cause of Action

The first cause of action alleges an express contract under which McFarland and Edward P. Johnson (hereinafter "Johnson") jointly and severally agreed to pay

to Tanner and Friedman the sum of $155,000 (in addition to time charges) if McFarland and Johnson acquired the leaseholds to Arlington Towers (hereinafter "the Towers"), the subject matter of the Gregory action above referred to. Knapp contends that such a "bonus" was payable to Tanner and Friedman regardless of the purchase price required by McFarland and Johnson to obtain title to the leaseholds. Knapp thus claims that McFarland is indebted to her in the sum of $77,500, which is one-half of the $155,000 "premium" allegedly due. This cause of action has come to be referred to as the "bonus claim" or the "$155,000 claim" or the "155 claim."

McFarland's answer to this cause of action admits an agreement to pay Tanner and Friedman $155,000 but contends that this obligation was conditioned upon his ability to purchase Arlington Towers for no more than $18,425,000. McFarland asserts that the parties agreed that if a greater sum was necessary in order to acquire the Towers, then the $155,000 "bonus" was to be reduced by the legal fees which had been paid or were due to be paid prior to the date of purchase and, further, McFarland maintains that the agreement contemplated that said payment was only to be made when the financial condition of Arlington Towers rendered payment financially feasible and prudent.

In response to McFarland's claim that a reduction was to be made if reacquisition was accomplished at more than $18-½ million, Knapp asserts that if this "version" of the contract is found by the court to prevail, then she is entitled to recover $48,641. This figure is derived by deducting from $155,000 the total amount of fees paid or owed to Tanner and Friedman prior to the purchase on August 21, 1965, to wit, $106,309.

2. Second Cause of Action

Knapp's second cause of action (as amended by the withdrawal of certain contingent claims) also alleges that McFarland and Johnson agreed to pay to Tanner and Friedman fees and disbursements for legal services for the period of September 1, 1965 through June 30, 1968 at the rate of $30 per hour for partners and $15 per hour for associates; that the remaining unpaid balance on said time charges and disbursements is $75,228.61 of which $37,614.31 (one half) is claimed by Knapp against McFarland. This claim has come to be referred to as the "$30-15 claim," the "30-15" and the "time charges claim."

McFarland's answer admits the agreement to pay at such rates, including disbursements. McFarland, by stipulation, has admitted the reasonableness of this retainer (TR-I-3).[1] McFarland, however, denies that Tanner and Friedman performed all of the legal services that he was billed for, and further contends that certain services, which were rendered, were not properly chargeable to him in that they were not within the scope of the retainer agreement.

3. Third Cause of Action

Knapp's third cause of action is an alternative claim to the first claim (i. e., the "155 claim") and it is based upon principles of *quantum meruit*. It alleges the purported reasonable value of the legal services rendered by Tanner and Friedman from December 1963 through August 31, 1965 and demands judgment for one-half of the unpaid balance.

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[1] "TR-I " references are to pages in the trial transcript numbered prior to the testimony of the first witness. Subsequent thereto, the pagination recommenced and the notation "Tr. " is utilized herein to note that change.

4. Fourth Cause of Action

Knapp's fourth cause of action is an alternative *quantum meruit* claim to the $30-15 cause of action.

In addition to various denials to the four causes of action above referred to, McFarland alleges, as an affirmative defense to Knapp's claims, that Tanner and Friedman, as attorneys, breached certain fiduciary obligations to McFarland in various ways and that this bars Knapp from recovery.

II.

McFarland v. Tanner and Friedman

On October 6, 1970, McFarland moved this court for an order permitting leave to institute an action against Tanner and Friedman directly (since the assignee would not be responsible therefor) to recoup attorney fees heretofore paid on the grounds, as above referred to, that Tanner and Friedman breached certain obligations during their representation of McFarland. On October 28, this court granted this motion. The caption in this action has been set out by the court to express, in abbreviated form, the actual alignments of the parties and to simplify the analysis of the court in disposing of this entire controversy.

With respect to McFarland's action against Tanner and Friedman, the attorneys deny the material allegations of McFarland's claim and allege further that McFarland's claim does not state a claim upon which relief can be granted and that it is barred by the three year statute of limitations.

III.

History of the Litigation

Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, the court, at the commencement of trial, conferred with the respective counsel and directed that Knapp's first and second claims be tried initially along with McFarland's affirmative defenses and claims asserted directly against Tanner and Friedman.

The court deferred the trial of Knapp's third and fourth causes of action, based upon *quantum meruit*, and reserved decision as to whether (1) the law permits these alternative claims; and (2) the presentation of any evidence on that subject until determination of the foregoing claims which were being tried.

On March 31, 1971, the trial was commenced before a jury. On April 6, 1971, Knapp and Tanner and Friedman terminated the employment of their original trial counsel and requested leave to continue with Friedman as trial counsel. The court granted this application, a jury trial being waived by all parties. The jury was thereupon dismissed and the trial continued before the court.

The court, having examined the exhibits, the Proposed Findings of Fact and Conclusions of Law submitted by counsel, and the testimony, makes the following Findings of Fact and Conclusions of Law:

I. Introductory Findings

1. Elizabeth K. Knapp, Arthur S. Friedman and Lester J. Tanner at the commencement of this action were and now are residents of the State of New York (Pretrial Order ["PTO"] ¶ 3[a]; TR-I-85). Walter P. Mc-

'arland at the commencement of this action was and ow is a resident of the Commonwealth of Virginia (PTO 3[a]; TR-I-85). The respective amounts in contro- ersy exceed, exclusive of interest and costs, the sum f $10,000 (PTO ¶ 3[a]; TR-I-85).

2. Tanner and Friedman now are and at all times ertinent hereto were attorneys at law duly admitted o practice in the Courts of the State of New York and he United States District Court for the Southern District f New York, and, with respect to Friedman, the United States Court of Appeals for the Second Circuit, and prac- icing their profession in the City of New York as co- artners (PTO ¶ 3[a]; TR-I-95; Tr. 1, 8, 584, 585).

3. On or about May 23, 1969, Tanner and Friedman uly assigned to Knapp their claims against McFarland nd Knapp is now the owner thereof (PTO ¶ 3[a]; TR- I-104).

4. McFarland and Johnson had certain agreements with certain group (the "Gregory Group") with re- spect to an apartment house project in Arlington, Vir- ginia called "Arlington Towers" (the "Towers"). These greements included a "Memorandum Agreement," under which the Gregory Group gave to the owners[2] of the memorandum rights for a certain time and under various prices to be determined by certain formulas the right to require one or more of the four apartment build- ings of the Arlington Towers project (the "Paragraph

[2] McFarland, unquestionably, was an owner of the memorandum rights above referred to. Whether Johnson was a co-owner of those rights, or merely was entitled to an apartment unit in the Towers is a question of fact which this court has not passed upon but which is the principal subject of the "Virginia action" referred to in Find- ing of Fact 30, *infra*.

9'' rights); the right to participate in profits generated by an offer for, or the sale of, the stock and debentures of the corporation owning the entire project (the "Paragraph 7 and 8 rights"); and the right to share in proceeds of, or from, the development or sale of a certain parcel of land called "C Ground" ("the Paragraph 6 rights") (Ex. 1).[3] In 1957, litigation was commenced in the name of McFarland, Johnson and one Loughran against the Gregory Group in the United States District Court for the Southern District of New York ("the suit" or "the Gregory action"). In 1961 the Gregory action resulted in a decree of specific performance (the "Original Judgment") in favor of the Gregory plaintiffs and in 1962, in a further decree (the "Supplemental Judgment"). Under the Memorandum Agreement (Ex. 1) and the Original and Supplemental Judgments of the District Court (Exs. 19 and 20), the owners of the memorandum rights had the option for a certain length of time and under certain prices and other terms and conditions to reacquire one or more of the Tower buildings. At all pertinent times, McFarland indicated his intention to exercise the Paragraph 9 rights (Tr. 27, 32, 273-274, 592).

II. The "$155,000 Bonus Claim"

5. In or about December, 1963 McFarland and Johnson (the "clients") retained Tanner and Friedman as their attorneys in connection with the enforcement of their claims and rights against the Gregory Group under the Memorandum Agreement and the Original and Supplemental Judgments made by the District Court in the Gregory Action (Answer; PTO ¶ 3[d]; Ex. 3; TR-I-86 Tr. 29-30).

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[3] Exhibits in evidence are referred to by the notation "Ex. ."

6. In September 1964, the "clients" agreed with Tanner and Friedman that:

> "(a) The clients would pay for the legal services rendered on their behalf at the rate of $30 per hour for the partners' time, and $15 per hour for the time of associates. And
>
> "(b) The clients would pay for the disbursements expended in connection with the performance of such legal services; and
>
> "(c) In the event Tanner and Friedman achieved 'a good result • • • either by way of litigation or judgment (of the claims of the clients) there would be an upward adjustment of fees based upon achievement.' "

(TR-I-87, 96; Answer ¶ 4; PTO ¶ 3[f]; Exs. 7 and 8; TR. 60-64, 261, 265, 589-590, 969). That fee agreement was conceded to be fair and reasonable to the "clients" (Answer ¶ 4; TR-I-3, 87).

7. In March, 1965, in the Gregory action, Tanner and Friedman applied for certain relief on account of alleged defaults of the Gregory Group under the Memorandum Agreement and the District Court's Judgments. Thereafter, settlement discussions were held among counsel for the parties, in the presence of the District Judge, looking toward exercise by the owners of the Memorandum rights of the Paragraph 9 option or overall settlement of all disputes existing between the parties (Tr. 233-237).

8. The settlement discussion above referred to failed (Tr. 238-240, 292-293, 371); on August 2, 1965 Tanner and Friedman applied in the Gregory action for a Paragraph 9 acquisition of the Arlington apartment buildings.

The application was accompanied by a tender signed by McFarland for the buildings at the then Paragraph 9 formula price (approximately $19,900,000), less a credit of $1,000,000 claimed in exchange for a waiver of Paragraph 7 and 8 rights (Tr. 83, 85, 239, 292-293). In anticipation of the Court's refusal to allow such credit as an advance deduction, between August 2 and August 4, 1965 arrangements were made by McFarland and Tanner to borrow an additional $1,000,000 to support a tender at the Paragraph 9 formula price (Tr. 239-240).

9. On August 4, 1965, McFarland, on behalf of the "clients," and Tanner, on behalf of Tanner and Friedman, agreed that if the "clients" reacquired the Arlington apartment buildings at the then Paragraph 9 formula price of approximately $19,900,000, the "upward adjustment of fees" (pursuant to the September, 1964 agreement bonus clause) would be $155,000 (Ex. 9; Tr. 81-88, 297, 369-370).

10. On August 24, 1965, in Arlington, Virginia, McFarland confirmed that $155,000 was the so-called "upward adjustment" of Tanner and Friedman's fee. At the request of McFarland, Tanner and Friedman agreed then to defer a meeting to set a schedule for the liquidation of this $155,000 debt (Tr. 601-603).

11. On August 30 and 31, 1965, the Gregory Group conveyed to McFarland and Johnson, who were represented by Tanner and Friedman, the four Arlington Towers apartment buildings at the then formula price, to wit, $19,900,000 (PTO ¶ 3[g]; Exs. 64, 65; TR-I-97; Tr. 105, 240-241, 520, 990).

12. On certain occasions after August 31, 1965, McFarland and Johnson acknowledged that $155,000 was the

amount of the additional "bonus" to which Tanner and Friedman were entitled. Thus:

(a) Some time shortly after June 15, 1966, in a conversation relating to time or schedule of payment thereof, McFarland orally acknowledged it to Friedman (Tr. 608-609).

(b) On February 7, 1967, McFarland confirmed it in writing (Ex. 27; Tr. 1083-1085).

(c) At the end of February and the beginning of March 1967, Johnson orally admitted and, in writing, confirmed it (Tr. 947, 1147-1148, 1183; Exs. 25, 26, 28).

13. On March 1, 1967, McFarland received from Tanner and Friedman a draft of a proposed fee letter for his approval and signature regarding the outstanding unpaid fees due to Tanner and Friedman (Tr. 1061, 1063). This draft contained a provision for the payment of "the additional fixed fee of $155,000 (heretofore agreed on in connection with the purchase of Arlington Towers)" (Ex. 26).

On March 4, 1967, Tanner and Friedman sent to McFarland, and he later received (Tr. 946, 1065), a letter stating that Johnson had informed Tanner and Friedman that the March 1 letter (above referred to) embodied McFarland's "understanding of, and agreement to, the terms of that fee arrangement with this firm" (Ex. 28).

It is undisputed that thereafter, bills were served by Tanner and Friedman on McFarland which included the fee obligation of $155,000 of the "clients" (Exs. 25, 26, 28; Tr. 630-631, 941, 946, 1063-1068; see also Defendant's memorandum, page 11, dated May 20, 1971).

14. When McFarland came to New York and met with Tanner and Friedman during the period from March 4,

1967 through June, 1967, he voiced no objection to the aforesaid bills for attorney fees sent to him which included a charge for the $155,000 bonus (Tr. 334, 545-550, 623-633, 782).

McFarland admitted that at no time between March 4, 1967 through November of 1967 did he notify Tanner and Friedman in writing of any objection to the inclusion of the $155,000 bonus in the bills that he received (Tr. 630-633, 1067).

15. McFarland has failed to pay to Tanner and Friedman any part of the $155,000 (PTO ¶ 3[p]; TR-I-101). McFarland is liable to Knapp in the amount of $77,500 ([one-half] of $155,000).

II. The $30-15 Time Charges

16. Between September 1, 1965 and June 30, 1968, Tanner and Friedman rendered legal services to McFarland and Johnson under an agreement which provided for the monthly payment of fees at the rate of $30 per hour for partners' time and $15 per hour for associates' time and for disbursements incurred (PTO ¶ 3[h]; TR-I-91, 97, 105). That fee agreement for the above-mentioned period (the "time charges agreement") was fair and reasonable to the "clients" (TR-I-3).

17. Between the period of September 1, 1965 and June 30, 1968, Tanner and Friedman actually devoted 7,130 hours, 20 minutes of partners' time and 4,141 hours, 15 minutes of associates' time and rendered bills aggregating $276,028.75 in time charges and $27,992.94 for disbursements (PTO ¶ 3[q]; Ex. 12, pp. 35-36; Tr. 120-138). To date, McFarland and Johnson have paid $201,719.25 with respect to time charges and $27,074.13 for disbursements,

leaving a claimed remaining balance of $74,309.50 on account of time charges and $918.61 for disbursements (PTO ¶ 3[q]; Ex. 57; TR-I-102; Tr. 164-166). McFarland has not paid any part of the foregoing outstanding balance (PTO ¶ 3[q]; TR-I-102).

18. On April 23, 1969, Tanner and Friedman agreed with Johnson that Johnson would pay $115,115.31. This figure is one-half of the total sum then claimed by Tanner and Friedman to be due from McFarland and Johnson. Tanner and Friedman expressly accepted this partial satisfaction without prejudice to their claims and rights against McFarland for the remainder of the balance due, which included the "$155,000 bonus" and certain unpaid time charges (PTO ¶ 3[q], 3[r], 3[s]; TR-I-102-103).

19. Tanner and Friedman did not charge McFarland and Johnson for any time not actually expended by them or their associates for services which they reasonably believed were necessary for their "client's" interests and for services which they believed they had been retained to perform (Tr. 345, 391, 563, 745-746, 810, 824, 842-844).

20. Tanner and Friedman properly charged McFarland, and Knapp is entitled to recover for the time rendered by Tanner and Friedman (and their associates) in the application made by Tanner and Friedman to withdraw as counsel and for *in camera* treatment in the Gregory action (Ex. D, pp. 10, 13-14, 25, 29-30, 39-41, 52; Tr. 729-735, 737-739, 782-786, 791-792, 1293, 1334-1335; see discussion, *infra*).

21. Tanner and Friedman properly billed McFarland and Johnson, and Knapp is entitled to recover for the time devoted by Tanner and Friedman at meetings with

McFarland, Johnson and their respective Virginia counsel to consider the impact of the Virginia action on the Gregory action (Ex. 41, diary sheets dated February 27, 28 and March 1, 1967; Ex. 51, diary sheets dated February 27, 28 and March 1, 1967; see discussion, *infra*).

22. Tanner and Friedman properly billed McFarland and Johnson, and Knapp is entitled to recover for the time rendered by Tanner and Friedman in reviewing Johnson's answer to the complaint in the Virginia action in order to protect certain challenges made by the Gregory defendants to the judgment therein (Ex. 42, diary sheets dated December 13, 14, 15, 1967; Tr. 731-735; see discussion, *infra*).

23. Knapp is entitled to recover for the time devoted by Tanner and Friedman to the Fodiman civil contempt proceedings heard before Judge Dimock during the Gregory litigation (Tr. 767-768).

24. After vacating the civil contempt proceedings against Fodiman, above referred to, Judge Dimock cited Fodiman in criminal contempt and appointed Friedman as "special prosecutor."

Before being relieved of that post, Friedman devoted and billed the "clients" for 34 hours, 55 minutes of partners' time and 87 hours of associates' time, totaling $2,352.50, one-half of which is claimed against McFarland by Knapp ($1,176.25).

The Fodiman criminal contempt proceeding is presently pending in this court before another District Judge.

I find that Knapp's claim for the Fodiman criminal contempt time charges is not sustainable since from the inception of that proceeding to date the court has not ruled that any fine (or part thereof) which may be levied

against Fodiman might be awarded to the Gregory plaintiffs or that the court might award attorney fees to the Gregory plaintiffs.

Tanner and Friedman's billing of this amount, however, was made in good faith, without any breach of their fiduciary obligations.

25. The attendance of both Tanner and Friedman at the Equitable deposition was necessary for the proper performance of their representation in the Gregory action and was within the scope of their retainer agreement with McFarland and Johnson. Knapp is entitled to recover for the time devoted by them at that deposition (Tr. 391-393, 745-746; see discussion, *infra*).

26. McFarland is presently liable to Knapp with respect to unpaid time charges and disbursements in the total sum of $36,839.30. This amount has been calculated by deducting from the total unpaid time charges and disbursements billed against McFarland ($37,614.30) one-half of the unpaid time charges for the services devoted to the criminal contempt proceedings ($775.00) ($37,614.30 minus $775.00=$36,839.30). McFarland has already paid $401.25 to Tanner and Friedman regarding the criminal contempt proceedings but has not requested any reimbursement either from Knapp or Tanner and Friedman for this payment.

27. Knapp is entitled to interest on the $77,500 "bonus" from August 31, 1965 to the date of judgment. Knapp is also entitled to interest on the unpaid monthly time charges and disbursements from the time that each monthly time charge became due to the date of judgment. The following is a list of the unpaid time charges and dis-

bursements at the respective monthly due dates from which I find that interest is due:

Last Day of Month During Which Services Were Rendered or Disbursements Incurred	Monthly Bill to McFarland
A. Legal Fees	
April 30, 1967	$ 505.63
May 31, 1967	5,295.00
June 30, 1967	6,870.62
July 31, 1967	4,028.13
August 31, 1967	4,317.50
September 30, 1967	5,658.12
October 30, 1967	768.75
November 30, 1967	2,565.63
December 31, 1967	924.37
January 31, 1968	2,993.13
February 28, 1968	742.50
March 31, 1968	206.87
April 30, 1968	121.25
May 31, 1968	704.38
June 30, 1968	678.12
B. Disbursements	
December 31, 1967	120.56
June 30, 1968	338.74

IV. Alleged Adverse Interests and Other Alleged Breaches of Fiduciary Obligations

28. In 1966 through at least July 1968, Edward P. Johnson was the major stockholder of Ernst and Company, Inc. (Tr. 321, 724).

29. In or about April 1967, Tanner and Friedman learned that disputes had arisen between McFarland and Johnson with respect to Arlington Towers (Tr. 728, 1110-1111).

30. In November 1967, McFarland commenced an action against Johnson in the Circuit Court of Arlington County, Virginia (the "Virginia action") (Ex. 78; Tr. 335, 1270).

31. McFarland's complaint in the Virginia action alleged, among other things, that at the commencement of the litigation with the Gregory defendants, the sole interest of Johnson in the Gregory action concerned his personal apartment lease and that the only person with rights under Paragraphs 7, 8 and 9 of the Memorandum Agreement was McFarland (Ex. 78).

32. When Tanner and Friedman learned of the action filed in Virginia by McFarland in November of 1967, they stated to Virginia counsel for both Johnson and McFarland that Tanner and Friedman and Virginia counsel should meet to discuss and consider the possible impact of the Virginia action upon the New York action (Tr. 791-792).

33. Tanner and Friedman told Virginia counsel for both McFarland and Johnson after the service of McFarland's Virginia complaint that they would be willing to look at any proposed future pleadings in the Virginia action and tell them whether there was any factual inconsistency between said pleadings and the proof adduced in the Gregory action in New York. In the first meeting thereafter held by Tanner and Friedman with McFarland and

his Virginia counsel and others, Tanner and Friedman told McFarland that they had read a draft of the Johnson answer (Tr. 731-735, 737).

34. Tanner and Friedman did not place themselves in a position of representing interests adverse to their representation of McFarland in respect to any of the following matters:

(a) Tanner and Friedman's referral of Johnson to a Washington, D. C. attorney to represent Johnson in the Virginia action (Tr. 110, 728-729, 1358-1363).

(b) Tanner and Friedman's compliance with requests from McFarland and Johnson and their respective Virginia counsel to supply documents relating to the Gregory action to Virginia counsel (Ex. K; Tr. 1111, 1363-1364).

(c) Tanner and Friedman's examination of a draft of Johnson's answer to McFarland's Virginia complaint prepared by McFarland's Virginia counsel (Tr. 730-730A, 733-734).

(d) Tanner and Friedman's application to withdraw as counsel for McFarland in the Gregory action or any other aspect of the Gregory suit.

35. Tanner and Friedman represented E. C. Ernst Inc. ("Ernst") in an anti-trust matter in 1965 and the beginning of 1966, which lasted about five months. Between June, 1966 and about the beginning of 1968, Tanner and Friedman did not represent Ernst on any matter (Tr. 318-319, 336, 726, 1111, 1313).

36. Tanner and Friedman did not represent Ernst on February 28, 1967 or March 1, 1967. At that time they

continued to represent the "clients" exclusively and pursuant thereto, they with Joseph McCarthy, counsel for Ernst, drafted a proposed option for McFarland and Johnson which, if signed, would have entitled Ernst to acquire either or both of McFarland's and Johnson's interest in Arlington Towers. This option-draft was never signed by McFarland (PTO ¶ 3[g]; TR-I-97; Exs. 58, 64, 65; Tr. 105, 240-241, 319, 323, 520, 725, 726, 765, 944, 990, 1093, 1111, 1147, 1182-1187, 1199, 1274, 1313).

37. Neither Tanner nor Friedman communicated with McFarland while they were in Washington, D. C. on February 27—March 1, 1967. They had every reasonable expectation that in connection with the said option agreement they were representing the mutual interests of both Johnson and McFarland and that there was no reason to communicate separately with McFarland (Tr. 556, 619, 763, 1128, 1155, 1173-1174, 1184-1189, 1315).

38. In June 1966, in the Gregory action, Judge Dimock of this Court ordered that there be a trial on the issue of damages recoverable from the Gregory defendants (Ex. 12, p. 6; Tr. 933). Trial of the said damage claims in the Gregory action commenced about December 5, 1966 and continued until July 1967; at that point the Gregory defendants moved to dismiss the claims for failure of proof (Ex. 12, pp. 13, 20; Tr. 313, 933).

39. In January, 1968, after the Gregory defendants had moved to reopen plaintiffs' case and to offer into evidence a copy of McFarland's Virginia complaint on the ground that its allegations were inconsistent with testimony given by McFarland and Johnson in support of the claims against the Gregory Group, Tanner and

Friedman made an application to the United States District Court for the Southern District of New York for leave to withdraw as McFarland's attorneys in the Gregory action, claiming (1) there was a conflict of interest between their then clients and (2) conflicting instructions from McFarland and Johnson to Tanner and Friedman pertaining to the conduct of the Gregory action and the response to be made to the said motion to open (TR-I. 99, 100; Ex. 81, Ex. D, pp. 14, 15, 24; Tr. 128, 335, 791, 1329, 1334-1335.

40. On January 30, 1968, Tanner and Friedman's application to withdraw as attorneys for McFarland in the Gregory action came on before Judge Dimock of this Court for hearing. Upon application of Tanner and Friedman, Judge Dimock ruled that the attorneys for the Gregory defendants should be excluded on the argument of the application of Tanner and Friedman to withdraw as counsel for McFarland (Ex. C, pp. 16, 652-16, 653, 16, 690-16, 691). The hearing on Tanner and Friedman's application to withdraw as counsel for McFarland in *McFarland, et al. v. Gregory, et al.* was held before Judge Dimock on January 31, 1968 (Ex. D, p. 1).

On January 31, 1968, after noting—

(1) that the rights prosecuted in the Gregory action in New York were in McFarland's name although ownership thereof might have been shared with others (Ex. D, pp. 21, 29-30).

(2) that the interests of McFarland and Johnson *inter sese* were not then and had not theretofore been before the District Court (Southern District of New York) for determination and would not be determined therein (Ex. D, pp. 10, 13-14, 25, 29), and

(3) that there was no conflict between the prosecution of the rights against the Gregory group and the *inter sese* dispute between McFarland and Johnson in the Virginia action with respect to ownership thereof (Ex. D, pp. 10, 13-14, 25, 29-30, 39-41, 52), Judge Dimock denied Tanner and Friedman's motion to withdraw as McFarland's attorneys (TR-I-99, TR-I-100; Tr. 335).

41. Tanner and Friedman's refusal to comply with McFarland's February, 1967 requests to provide an itemized bill of all monthly time charges rendered to McFarland and retained by him, without protest, from September, 1966 through January, 1967 did not constitute a breach of their attorney's obligation of candor and full disclosure because McFarland's request was not made in good faith or in the ordinary course of business and because Tanner and Friedman had already given McFarland an explanation in great detail (Exs. 15, 60, 66A, 67).

42. There is no evidence in the record that any act alleged by McFarland to have been performed by Tanner and Friedman in breach of their obligations as attorneys caused any damage to him.

Discussion

I. *The September, 1964 Fee Agreement Is Enforceable*

McFarland claims that the September, 1964 agreement which contains the bonus provisions is not enforceable in that it allegedly is "a mere agreement to agree." Specifically, McFarland challenges the following language:

> "It is also our understanding that if we [Tanner and Friedman] are successful in achieving a good result, either by way of litigation or settlement of this dispute, there will be an upward adjustment of fees, based upon achievement." (Ex. 7)

McFarland's argument is both factually and legally untenable.

First, with respect to the facts, McFarland misconstrues the nature of Knapp's claim. This action is not predicated alone upon the enforcement of the above language. This is not an action prosecuted because of the unwillingness of McFarland to agree to what a "good" result or "upward adjustment" should consist of. Instead, this action is based upon the enforcement of the fee arrangement of September, 1964 as supplemented by the understanding reached by the parties on August 4, 1965. Thus, although the above language contemplated and required further specification in order to be enforceable, the parties subsequently supplied the equivocal undefined terms.

McFarland's contention is also factually inconsistent with another position advanced by him during this litigation. Since the inception of Knapp's suit, McFarland has claimed that Knapp's alternative *quantum meruit* cause of action to the first claim must be dismissed as a matter of law on the grounds that an "express contract," to wit, the September, 1964 agreement, already "covered" this claim. McFarland, thus, has always advanced the contention that the September, 1964 fee agreement was legally sufficient and enforceable for the purpose of interposing his defense to the *quantum meruit* cause of action.

The terms of the bonus clause are an integral part of the entire retainer agreement and, therefore, cannot be severed from it. Clearly, the terms of the contract are interrelated: "It is *also* our understanding that if we are successful * * * there will be an adjustment * * *." Moreover, the evidence discloses that the intent of the parties was not to negotiate severable and independently enforceable terms but, rather, Tanner and Friedman were willing to agree upon a minimum time charges rate because the opportunity for further compensation in the form of a "bonus" was expressly included in the contract.

The applicable law also disposes of McFarland's argument. Regardless of the validity of the general proposition that "agreement to agree" are illusory and, therefore, unenforceable, this principle has no application in the context of interpreting employment contracts which include open additional compensation clauses. The New York cases reveal that (1) where parties enter into an agreement providing for certain immediate compensation to be paid and also provide for a subsequent upward adjustment of that compensation, to be determined at a later time, the contract is enforceable; and further (2) that if the parties fail to definitively reach an understanding as to what shall constitute the premium, the court will determine an appropriate bonus rather than deem the contract unenforceable. See *Pillois v. Billingsley,* 179 F. 2d 205 (2nd Cir. 1950); *Heller v. Kalish,* 141 App. Div. 205 (First Dept. 1910), and *Plattenburg v. Briggs,* 166 App. Div. 326 (Third Dept. 1915).

Two additional points distinguish several of the pertinent cases cited by McFarland. First, in suits (such as the present one) predicated upon the enforcement of agreements for services which have been fully performd prior to the commencement of the action, the courts are more inclined to characterize such contracts as enforeable. *Pillois* v. *Billingsley, supra.* Seondly, the terms of the instant agreement state that a premium "will" be paid based upon the occurrence of a "good result"; thus, the language of the contract did not leave McFarland with the unilateral option to capriciously refuse to award a bonus, although it admittedly left the amount undetermined until the value of the services to be rendered by Tanner and Friedman could be assessed. *Leighton v. New York S. & W. Ry. Co.,* 303 F. Supp. 599 (S. D. N. Y. 1969), illustrates this principle. In that case the plaintiff (attorney) and defendant (client) advanced conflicting con-

tentions as to the meaning of the "achievement" required for the plaintiff to recover a fee. The client asserted that his counsel had to obtain permission for the discontinuance of all passenger service in order to recover, whereas the plaintiff contended that the standard was lower. The Court held that it would determine what the parties contemplated by the term "achievement" rather than deem the contract unenforceable. The Court ruled that a definite pecuniary benefit to the client was the "good result" contemplated. The client therein also claimed that the contract was unenforceable for an additional reason—the parties had failed to fix a definite amount of compensation for the legal services performed. The Court, nonetheless, held that the contract was enforceable and proceeded to determine an equitable amount based upon the value of the benefit to the client.

II. The $155,000 Bonus Claim

1. The August, 1965 Letters

On August 16, 1965, McFarland wrote Tanner that he agreed to pay the $155,000 bonus with the proviso that payment be deferred. He requested Tanner and Friedman's acceptance (Ex. 10). Instead of so doing, Tanner and Friedman sent a letter, dated August 18, 1965 (Ex. 11), purporting to "bridge the difference" between the parties on the question of the "time for payment of the fees upon which we have agreed." The letter set forth a schedule for the liquidation of McFarland's debts to Tanner and Friedman and requested that McFarland confirm the schedule; none followed. On August 24, 1965, Friedman visited McFarland; McFarland asked Tanner and Friedman to defer setting fixed payment dates until the financial status of Arlington Towers could be assessed and a workable tempo for liquidating the debt could be arranged. Tanner and Friedman each agreed.

McFarland contends that the above exchange of letters constitutes a series of offers and counteroffers, which do not manifest a binding agreement. McFarland is incorrect for two reasons: First, Knapp has never contended that this series of letters constitutes a bonus contract; her position has always been that on August 4, 1965, McFarland orally agreed to pay the bonus and that written confirmation was never requested by McFarland. The evidence disclosed that after McFarland agreed to pay the bonus, he attempted to repudiate the contract by insisting that a deferment in payment be arranged. These attempts, however, do not abrogate the binding contract theretofore made. 1 Corbin § 85, p. 367. Second, when the letters (Exs. 9, 10 and 11) and conversations of the parties are analyzed to determine whether they eventually reached a mutual understanding, the same conclusion follows—a binding agreement was made.

McFarland claims that although he stated in his letter of August 16 that "* * * [McFarland and Johnson] agree in substance to pay the extra fees," he did not unconditionally bind himself because he interposed the deferment in payment. Nevertheless, expressions of assent by an offeree, which contain immaterial deviations from the original offer, do not constitute counteroffers but, rather, operate to bind the parties to an enforceable contract. 1 Corbin § 84, p. 365, n. 5. See also U.C.C. 2-207, which states:

> "(1) A definite seasonable expression of acceptance * * * operates as an acceptance although it states terms additional to those offered or agreed upon."

McFarland's statement in his letter of August 16, 1965 (Ex. 10), that he agreed to the bonus, manifests his acknowledgement that the bonus was then due and his

willingness to pay it at some time. His request for a deferral in payment was immaterial to the validity of his assent; clearly the parties had never before predicated the *existence* of their fee arrangements upon the time of payment.

Furthermore, notwithstanding any previous unresolved question as to the time of payment, the August 24, 1965 discussion between Friedman and McFarland settled this point, to wit, Tanner and Friedman withdrew their insistence upon setting a definite schedule for payment of McFarland's debts.

2. Claim That McFarland Would Not Have Agreed to Payment of a Bonus If Reacquisition Required More Than $18,425,000

Another major contention that McFarland has advanced to dispute the claim that he agreed to the bonus is his assertion that when the contemplated $18,425,000 settlement with the Gregory defendants collapsed, the reason for payment of the additional fee had disappeared. He claims that if he had to pay more than that settlement figure, there was no reason to consider paying Tanner and Friedman a premium (Tr. 938).

In analyzing this position, the critical fact to note is that by August, 1965, McFarland knew that he would have to pay $19,900,000 in order to purchase Arlington Towers. With this in view, contrary to McFarland's contention, the record discloses that:

1. When McFarland originally took the stand, he related that his first and *only* response to Tanner's letter of August 5, 1965 (Ex. 9) was his letter of August 16, 1965 (Ex. 10). On cross examination, however, he recalled that he did discuss the August 5, 1965 letter on August 10 and told Tanner the "bonus" was a dead issue

which he "did not want to hear any more about." Nevertheless, on August 16, 1965, McFarland wrote to Tanner (Ex. 10), without mention of the discussion of August 10, nor even intimating that the bonus question was a "dead issue." The letter proceded, in substance, to acknowledge that a bonus was to be paid.

2. McFarland's letter of August 16, 1965 (Ex. 10) made no mention of Tanner's statement that Tanner was "confirming" an "understanding" which, if reached, would have been made prior to August 5, 1965.

3. McFarland admitted that after the aborted July settlement conference he agreed to pay Tanner and Friedman a bonus if Arlington Towers was reacquired for more than $18-1/2 million (Answer, ¶ 6; Tr. 987). Thus, by McFarland's own admissions, there at least must have been some reason to pay a bonus (however large or small) when the reacquisition price increased.

4. The prime objective of McFarland from the inception of his relationship with Tanner and Friedman was to obtain the conveyance of the Towers, which by McFarland's own estimation had a market value of about $25 million. Indeed, he devoted eleven years of litigation, including several appeals, to accomplish that objective.

3. McFarland's Affimative Acknowledgments and Admissions by Silence

McFarland's own admissions constitute additional proof that Knapp's version of the bonus contract is the more persuasive one.

Friedman testified that after Judge Dimock awarded damages of $700,000 plus the "C Ground" proceeds to

McFarland, Tanner and Friedman again attempted to reduce the $155,000 debt by the application of some of these funds. Although McFarland denied having this discussion, his letter to Harold Ungar, dated February 7, 1967 (Ex. 27), confirmed the fact that Tanner and Friedman had proposed to McFarland a schedule for liquidation of the entire debt, including the bonus. In the same letter McFarland admitted that he had agreed to pay a bonus and was apparently principally disconcerted by the attorneys' insistence upon immediate payment (Ex. 27, ¶ 15 of the so-called "History"). In another section of the letter, McFarland again acknowledged the debt (Ex. 27, ¶ 14 of the "History").

After McFarland in Exhibit 27 supplied the "History," above referred to, he proposed to Ungar a method of adjusting his debts for legal services with Tanner and Friedman:

> "4. This arrangement assumes a substantial sum to be received by Plaintiffs in damages. If not, the $155,000 as originally agreed, would be paid only when the economical and cash picture would so permit in the opinion of Walter P. McFarland."

McFarland argues that the above reference to "the $155,000 payment, as originally agreed," relates to his agreement in July of 1965 to pay a bonus when the price of acquiring the Towers was $18-1/2 million. This assertion, however, is incorrect for paragraph 4 above relates McFarland's concern for tying the payment of the $155,000 to the economic feasability of liquidating his debts—a problem which he did not encounter until *after* he had acquired Arlington Towers.

McFarland, by his failure to reply to several periodic statements of fees due (including the $155,000 bonus), submitted by Tanner and Friedman, admitted the propriety of this charge.

The controlling cases make clear that where a relationship of "creditor" and "debtor" exists, such an attorney-client relationship, with a regular course of rendering bills for services performed, the client-debtor's retention of those statements, without dispute, is deemed an admission of their accuracy.

Thus, in *Hellenic Lines Ltd. v. Gulf Oil Corp.*, 340 F. 2d 398 (2nd Cir. 1965), the Appellate Court held that a letter containing the creditor's assertion that the debtor was bound to perform a disputed agreement indicates an admission by silence when the debtor failed to object or dispute that contention after a reasonable length of time elapsed (see *Hellenic* at p. 401).

This principle has been applied by the New York Courts in cases involving actions for attorney fees. Knapp correctly cites *Rodkinson v. Haecker,* 248 N. Y. 480, 485 (1928) for this principle.

> "As a general rule where an account is made up and rendered, he who received it is bound to examine the same or to procure someone to examine it for him. If he admits it to be correct, it becomes a stated account and is binding on both parties. If instead of an express admission the party receiving it keeps the same by him and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and he will be bound by it as if it were a stated account."

See also *Steingart Associates, Inc. v. Sandler,* 28 A. D. 2d 801, 803 (Third Dept. 1967).

McFarland asserted that he did not remain "silent" but expressed his protest to Tanner and Friedman. McFarland's recollection, however, was vague and confused and I am not impressed with the credibility of these statements. Moreover, he admitted that he never expressed

any objection to Johnson. Although McFarland was a prolific letter writer, he testified that he did not protest in writing to Tanner and Friedman until nine months after the fee statements were submitted to him.

III. The $30-15 Time Charges

Knapp's second cause of action (as amended by the withdrawal of certain contingent claims) alleges that McFarland and Johnson are liable for unpaid time charges and disbursements incurred during the period of September 1, 1965 through June 30, 1968. The language of the retainer covering this period states that Tanner and Friedman were to render legal services to their clients "in further prosecution of the Suit, matters ancillary thereto and litigations on and relating to the operation of the Arlington Towers project." (TR-I-89)

McFarland assails this claim on two grounds: First, he contends that he was charged for time which was not actually expended, i. e., "padded time," and was billed for "unnecessary and duplicative services." Secondly, McFarland claims that he was charged for certain services which, although performed, were not within the scope of the retainer as outlined above.

With respect to the contention that Tanner and Friedman rendered "padded" bills, the evidence does not sustain this charge. Although McFarland elicited on cross examination that in several instances these attorneys failed to sign the register when entering the office building during periods of time which they charged McFarland for, the proof disclosed that Tanner and Friedman did not have a systematic routine or a business policy of signing the register upon entering the building but, rather, of signing only when the security attendant so requested.

Moreover, the diary entries made by these attorneys disclose that Tanner and Friedman frequently worked on problems for their clients at home. Five separate attorneys connected with the firm testified that they never recorded anything in their time records which did not accurately and truthfully reflect the time devoted to McFarland's interests (Tr. 563, 825, 835, 843). When McFarland offered a copy of a diary entry of Tanner (Ex. J) made on October 23, 1966 in an attempt to prove that one hour of the time charged on that day was fabricated, this alleged disparity was disputed by testimony that Tanner devoted an additional hour out of his office (Tr. 347, 348, 567).

One claim of alleged "unnecessary and duplicative services is the so-called "Equitable depositions," conducted in the Gregory action. McFarland contends that Tanner's attendance of 69 hours in addition to Friedman's, constitutes "double representation."

McFarland's assertion is, however, without merit. The manner of conducting the course of litigation, including examinations before trial, is largely within the discretion of an attorney, subject to principles of good faith and the Canons of Legal Ethics. McFarland has not challenged Tanner and Friedman's bona fides. It is indisputable that the Gregory action involved complex issues of law and fact requiring legal experts who specialized in particular phases of the law. Although Friedman was the principal trial counsel, it is clear that Tanner's knowledge with respect to tax matters and general familiarity with the previous details of the lengthy action reasonably justified his presence. Moreover, the testimony, and particularly letters to Tanner and Friedman, disclosed that at McFarland was aware of the necessity of engaging both Tanner and Friedman in the preparation for trial and that from time to time McFarland urged their joint efforts (Tr. 397-398).

The second type of challenge which McFarland makes to the time charges concerns services which were admittedly performed but which McFarland contends are not chargeable to him.

1. Tanner and Friedman's Motion to Witdraw as Counsel.

The application to withdraw as counsel was made in January, 1968, after and as a result of McFarland's Virginia suit against Johnson claiming that McFarland alone was the exclusive owner of the Memorandum rights in Arlington Towers prior to August 31, 1965. Despite this assertion, the record in the Gregory proceedings in this Court reveals that McFarland had testified therein that other persons, including Edward Johnson, had an interest in those rights (see testimony of McFarland at the following pages in the Gregory "compensation" case: pp. 15,010-15,012, 15,022-15,023, 15,565-15,566). Hence, the immediate effect of the commencement of the Virginia action on the Gregory suit was a motion by the Gregory defendants to reopen their case to apprise the Court of McFarland's apparently inconsistent positions (see Gregory compensation case, pp. 16,617 *et seq.*)

Notwithstanding that action by the Gregory defendants, McFarland instructed Tanner and Friedman to defer action of that motion; Tanner and Friedman, however, considered it imperative under the Canons of Legal Ethics to immediately notify the Court of the apparent discrepancy.

An additional difficulty confronted Tanner and Friedman which independently impelled their motion to withdraw. On January 4, 1968, Tanner and Friedman were given conflicting instructions by McFarland and Johnson as to the approach to utilize in opposing the Gregory

defendants' motion to reopen the case (Tr. 128, 791, 1293, 1334-1335).

Under the circumstances, then, it was reasonable, and perhaps obligatory, for Tanner and Friedman to notify the Court of their predicament. Since the motion to withdraw was not precipitated by their own conduct, but, rather, by their clients' action, albeit honestly motivated, the time charges involved are clearly compensable.

This Court is cognizant of the fact that Judge Dimock refused to grant the application to withdraw. In so doing, however, Judge Dimock premised his decision upon the fact that he had no jurisdiction to litigate the rights of McFarland and of Johnson *inter sese*. In ruling upon the motion, the Court did not have to consider whether McFarland's testimony was, in fact, inconsistent since it initially concluded that McFarland alone was the sole nominal plaintiff in the compensation proceedings.

McFarland can take no refuge in the fact that he opposed the motion to withdraw as counsel. McFarland claimed that he was the exclusive owner of the Memorandum rights but insisted that there was no reason for a withdrawal. McFarland, however, was willing to permit the withdrawal provided that Tanner and Friedman also were relieved as counsel to Johnson.

2. *Review of the Potential Inmpact of the Virginia Complaint upon the Gregory Action, Including a Review of Johnson's Answer*

The potential impact upon the Gregory action of the allegation made by McFarland in the Virginia suit has already been outlined. The proof disclosed that Tanner and Friedman had no knowledge of the institution of the Virginia suit until after its inception. Tanner and Friedman reasonably believed that McFarland's complaint had

complicated, if not jeopardized, the Gregory judgment. It was for the purpose of avoiding jeopardizing the very litigation which Tanner and Friedman had been retained to prosecute that led the advice by Tanner and Friedman to McFarland and Johnson (and their Virginia counsel) to permit the New York attorneys to examine the pleadings and analyze whatever implications might arise (Tr. 731-735). Indeed, Tanner and Friedman may well have been remiss in their duties had they not considered the possible adverse implications.

The evidence failed to disclose that Tanner and Friedman assisted in the preparation of the drafts or did anything except to read the documents with a view of preserving what they believed to be the mutual interests of McFarland and Johnson in the Gregary action (Tr. 731-735). Consequently, McFarland and Johnson were properly charged for the time so expended.

3. The Draft of the Ernst Option and the Ernst Option Meetings

On Monday, February 27, 1967, Tanner and Friedman traveled to Washington at the request of Johnson to discuss the possibility of settling the arrearages in payments of the "clients." At that time Tanner and Friedman had no knowledge that an option agreement would be proposed whereby E. C. Ernst, a corporation principally controlled by Johnson, would purchase the interests of either or both McFarland and Johnson. It is undisputed that at that time McFarland and Johnson collectively owned Arlington Towers and had retained Tanner and Friedman to represent them in matters relating to the property. When Tanner and Friedman arrived in Washington, D. C., they were informed by Johnson that McFarland had requested the preparation of an option for the sale of Arling-

ton Towers to Ernst and Company, setting a purchase price of $3 million for McFarland's interests. While McFarland admitted the receipt of this document on the following day, he denied that he requested its preparation. Contrary to McFarland's contention, however, the record disclosed that he had expressed an interest in selling his rights in Arlington Towers to Ernst and Company (indeed, he so admitted in his Virginia complaint) (Ex. 78, pp. 1209-1211) and requested the preparation of the option. The document was delivered to McFarland within the twenty-four hour period requested by McFarland and without any explanatory covering letter (Tr. 939, 1273-1274).

Furthermore, it is clear that at least after August 31, 1965, McFarland and Johnson were partners in the operation of Arlington Towers (Ex. 58) and that Tanner and Friedman were retained for their mutual benefit. In such an instance, the law clearly permits one partner (Johnson) to bind the other for legal expenditures with respect to property mutually owned.

4. *Fodiman Contempt Proceedings*

The Fodiman contempt proceedings were hearings which originated in connection with a subpoena *duces tecum* which was served by the Gregory plaintiffs upon Horn, an accountant employed by the Gregory defendants. Horn refused to comply with the subpoena at the advice of one of the Gregory defendants' counsel, Aaron R. Fodiman (Tr. 767-768).

In response, Judge Dimock adjudged Fodiman in civil contempt and levied a fine which included an award of attorney fees of $1,000 per day for the time expended in prosecuting the civil contempt, payable to the plaintiffs in the Gregory action. Clearly, then, the efforts of Tanner and Friedman in conducting the prosecution of the civil

contempt proceedings were performed in pursuit of the pecuniary interests of their client (i. e., the fine) and Knapp is entitled to recover therefor although the court subsequently vacated the judgment on procedural grounds.

Thereafter, Judge Dimock directed that a criminal contempt proceeding be instituted against Fodiman and appointed Friedman as "special prosecutor," for which Knapp now claims payment for the unpaid time charges incurred.

McFarland claims that Judge Dimock's appointment of Friedman was not requested by him and that Friedman served exclusively as an officer of the court to vindicate an affront to its dignity for which compensation from McFarland is unwarranted.

Knapp asserts that Friedman's services were directed to insure the future compliance of other subpoenas which were (then) to be served in litigating the Gregory matters. Knapp, therefore, claims that the attorney's efforts directly contributed to the success which the plaintiffs in the Gregory action ultimately enjoyed.

Knapp advances the additional argument that any criminal fine which may be assessed against Fodiman would be, as is occasionally the case, payable to a party, here McFarland. (See, for example, *Searls v. Worden,* 13 Fed. 716 [E. D. Mich. 1882], revd on other grounds 121 U. S. 14 [1886] and *Parker v. United States,* 153 F. 2d 66, 71 [1st Cir. 1946].) Knapp thus claims that although the jurisdiction of the Court altered, Friedman's efforts continued to be a reasonable and necessary expenditure of time in pursuit of his client's pecuniary interests.

The principal difficulty in reaching this position lied in the fact that neither Judge Dimock nor Judge McGohey (who is presently presiding in this matter) ruled that any fine imposed upon Fodiman would be payable to McFarland. It is still speculative as to whether Friedman's appointment as special prosecutor was for the potential financial benefit of McFarland.

IV. Affirmative Defense and Claim for Repayment

As previously stated, McFarland has alleged that Tanner and Friedman performed services for adverse interests. More specifically, McFarland alleges that Tanner and Friedman represented the interests of Johnson and E. C. Ernst & Co. in violation of their duty of individual loyalty to McFarland.

This claim is raised as an affirmative defense to Knapp's contract claims and as a claim to recover past fees paid by McFarland to Tanner and Friedman. The other alleged breaches of duty that form the basis of the claim are McFarland's contentions that Tanner and Friedman falsified the number of hours they expended and that Tanner and Friedman charged McFarland for unnecessary and duplicative services. We have dealt with these latter two claims in our discussion of the main case, and so our discussion here of the affirmative defense and claim for repayment of fees will center only on a consideration of the claim of adverse interest.

McFarland has alleged a number of acts as evidencing the representation by Tanner and Friedman of interests adverse to those of the defendant-client. This court, however, is unconvinced. McFarland's proof demonstrates nothing more than that Tanner and Friedman found themselves in an increasingly more difficult position as the relationship between their co-clients deteriorated, while they endeavored to fulfill their duty to both clients.

McFarland's argument seems to be based on a contention that Tanner and Friedman represented McFarland and Johnson as clients with separate and distinct interests in Arlington Towers. However, it is quite apparent from the record and, in fact, stipulated at the trial (TR-I-86) that McFarland and Johnson acted jointly in the retaining of Tanner and Friedman to represent their mutual interest in Arlington Towers.

Thus, although McFarland places great emphasis o the fact that Tanner and Friedman dealt with Johnso in the preparation of the Ernst option on February 2 and March 1, 1967, there is nothing to indicate that thi was done in derogation of McFarland's interests. Tanne and Friedman had been representing McFarland an Johnson as co-owners in matters relating to the Virgini property. The fact that they dealt with only one of th co-owners in the preparation of the option hardly indicate a conspiracy against the rights of the other co-owne even though Ernst & Co. was owned by Johnson. The is no evidence which indicates that Tanner and Friedma should, at that point, have realized that the relationshi between McFarland and Johnson had been altered.

Moreover, there is evidence to conclude that McFarlan had indicated his own interest in the sale to Ernst & C Thus, there was further reason for Tanner and Frie man to believe that they were representing the interes of both clients in the drafting of the opinion. Add tionally, Ernst was represented at all relevant times b its house counsel, Joseph McCarthy. Finally, it must b remembered that the document which Tanner and Frie man drafted was nothing more than an option which w to be submitted to McFarland on the very next day f his review. McFarland's position here comes down to contention that Tanner and Friedman should have r jected a request by one of their clients to prepare a dra of an option for the submission to both clients. Th concept of the duties of an attorney is difficult to accept.

McFarland's other contention as to representation of a verse interests are equally unsubstantial. He points to t fact that Tanner and Friedman supplied Johnson or h attorneys in the Virginia action with certain papers. The papers pertained to the 1965 acquisition of Arlingt Towers and were papers of record in the Gregory li

gation. Since Tanner and Friedman represented both McFarland and Johnson in that matter, Johnson had every right to those papers. Failure by Tanner and Friedman to supply those papers might in fact have amounted to a breach of their professional duties.

Equally frivolous is McFarland's reliance upon the fact that Tanner and Friedman supplied Johnson with the name of an attorney to whom he could speak in relation to his problem with McFarland. This was merely part of Tanner and Friedman's effort to avoid being drawn into the Virginia dispute themselves and thereby avoid any possible ethical impropriety.

McFarland next points to the fact that Tanner and Friedman reviewed a draft of Johnson's answer in the Virginia litigation. Tanner and Friedman offered to review the pleadings of both sides and it was done merely to avoid having papers submitted in the Virginia action which would compromise their clients' position in the New York action.

This leaves us finally with the attempt by Tanner and Friedman to withdraw as counsel in the New York action. McFarland's contention here is that this application was not so much a withdrawal as an attempt by Tanner and Friedman to have the Judge rule that Johnson had an interest in the New York action. This is not supported by the evidence. Tanner and Friedman were faced with an obvious rift between their clients and it was counsel's belief that if they continued to represent both McFarland and Johnson they might be opening themselves up to charges of the exact sort that are now being levelled against them. Thus they sought to be relieved.

I conclude that there is nothing to indicate that Tanner and Friedman represented interests adverse to McFarland and Johnson. This affirmative defense must fail and the claims for repayment of fees paid must be dismissed.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and of the parties herein pursuant to 28 USC § 1332(a).

I. The $155,000 and Unpaid Time Charges Claims

2. The September, 1964 retainer agreement between Tanner and Friedman and Johnson and McFarland is valid and enforceable.

3. The assignment of Tanner and Friedman's claim to Knapp against McFarland is valid and enforceable.

4. McFarland is indebted to Knapp in the sum of $77,500 on the bonus claim.

5. McFarland is indebted to Knapp in the sum of $36,839.30 on account of unpaid time charges.

6. Knapp is entitled to judgment against McFarland in the total sum of $114,339.30, with interest.

7. Knapp's third and fourth alternative claims for recovery based upon *quantum meruit* are dismissed.

II. The Adverse Interests and Breaches of Fiduciary Obligations Claims

8. Tanner and Friedman had the obligations, as attorneys to represent McFarland with undivided loyalty, fairness, and without any interests adverse to him; at no time did they breach any of these obligations. Canons of legal Ethics, 6, 16, 22, 32, 41, 44; *Eisemann v. Hazard*,

218 N. Y. 155 (1916); *Re: Bond and Mortgage Guarantee Co.*, 303 N. Y. 423, 431 (1952); *Matter of Trybom*, 168 Misc. 484 (Sur. Co., Westchester Co., 1938); *Matter of Youngentob*, 181 App. Div. 490, 493 (First Dept. 1918); *Matter of Dix*, 21 Misc. 2d 864, aff'd 11 App. Div. 155 (1916).

9. Tanner and Friedman billed McFarland and Johnson in good faith for the Fodiman criminal contempt time charges and did not breach their fiduciary obligations by rendering this statement.

10. McFarland has failed to prove his affirmative defenses against Knapp. Tanner and Friedman are entitled to the dismissal of all claims asserted against them by McFarland.

11. Knapp and Tanner and Friedman are together entitled to one bill of costs since their interests, as assignee-assignor in the litigation of the contract claims as well as the affirmative defenses and reimbursement claims are identical.

Settle judgment on notice pursuant to the foregoing.

Dated: New York, N. Y.
July 1, 1971.

(SGD) RICHARD H. LEVET
United States District Judge

Memorandum and Supplemental Finding of Fact.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ELIZABETH K. KNAPP,

Plaintiff,

against

WALTER P. MCFARLAND,

Defendant.

WALTER P. MCFARLAND,

Plaintiff,

against

LESTER J. TANNER and ARTHUR S. FRIEDMAN,

Defendants.

69 Civil 2590

LEVET, D. J.:

Pursuant to the opinion of this court, dated July 1, 1971, counsel for Knapp and Tanner and Friedman have presented a judgment for signature and entry. Counsel for McFarland has interposed one objection thereto by letter dated July 7, 1971, contending that the issue of the reasonableness of the $155,000 bonus agreement remains unresolved.

At the conclusion of trial, the court stated to the respective counsel that "this [trial] relates to *all* matters as to whether or not the $155,000 specific fee is sustained." Additionally, this court has found (Finding of Fact 5) and McFarland has admitted (Answer ¶ 4; PTO ¶ 3[f];

TR-I-3, 87) that the September 1964 fee agreement, which included a provision for a bonus, was fair and reasonable. Nonetheless, in order to clarify this matter, the following additional Finding of Fact is hereby made to supplement the opinion of July 1, 1971:

SUPPLEMENTING FINDING OF FACT

6A. The said $155,000 bonus contract is a fair and reasonable compensation agreement and was understood as such by McFarland when made (August 4, 1965).

The record clearly supports this finding. (1) At the time that the $155,000 bonus contract was agreed upon, Tanner and Friedman had already performed 20 months of legal services for McFarland, including negotiations regarding, and litigation of, the Gregory action. (2) The attorneys were instrumental in obtaining additional finances at a critical time in order for McFarland to achieve his objective—reacquisition of Arlington Towers after 11 years of litigation (see opinion, p. 36). (3) Tanner and Friedman's efforts resulted in an accomplishment which afforded McFarland a substantial economic benefit, that is, reacquisition for $19.9 million of property *valued by McFarland* at about $25 million.

McFarland clearly was aware that the bonus agreement was fair and reasonable when he made the agreement. (1) His business sophistication and acumen have already been noted by the court (see p. 42 of opinion). (2) Throughout most of the relationship with Tanner and Friedman, McFarland made suggestions as to the conduct of the litigation and, at times, directed the course to be followed (see p. 43 of opinion). (3) It is worthy to note that the $155,000 contract was a related and coordinate part of the $30-15 time charges agreement and that

Tanner and Friedman were willing to agree upon minimum time charges because *McFarland* offered a "bonus" as additional compensation for their services. Clearly, then, McFarland knew that the agreement was fair and reasonable and at no time did he otherwise contend.

Accordingly, I have signed the judgment presented by counsel for Knapp and Tanner and Friedman.

So ordered.

Dated: New York, N. Y.
July 9, 1971.

(SGD) RICHARD H. LEVET
United States District Judge

APPENDIX B

United States Constitution.

Amendment V

82nd Congrss Senate Document 170, p. 40

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

82nd Congress Senate Document 170, p. 41

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX B

Federal Rules of Civil Procedure 28 U.S.C. Rule 43(a).

"Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules."

APPENDIX C

UNITED STATES DISTRICT COURT
United States Courthouse
New York, N.Y. 10007

Chambers of
JUDGE RICHARD H. LEVET

June 1, 1971.

Tanner & Friedman, Esqs.
99 Park Avenue, New York, N.Y. 10016

Re: Knapp v. McFarland, 69 Civ 2590

Gentlemen:

Will you please be good enough to prepare and send to me on or before June 7th a statement showing—

(1) what inconsistencies by McFarland existed with respect to the New York and Virginia actions which were referred to in an affidavit of Friedman dated January 16, 1968 in the application for withdrawal. State fully, referring to sources or exhibits. Send a copy of your statement to your adversary and file the original with me.

(2) State on what grounds Tanner & Friedman contend that McFarland is liable for attorneys' fees under the 30-15 agreement, relating to the application to withdraw. State fully with facts relied upon; serve and file as in No. 1 above.

Thank you.

Cordially yours,

(SGD) RICHARD H. LEVET
United States District Judge

CC: Easton, Van Winkle & Greenspoon, Esqs.
201 East 42 Street, New York, N.Y.